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Supreme Court of the United States

October Term, 1993

NEW YORK STATE DEPARTMENT OF ENVIRONMENTAL CONSERVATION, COMMISSIONER THOMAS C. JORLING, and DEPUTY COMMISSIONER AND GENERAL COUNSEL MARC S. GERSTMAN,

Petitioners,

against

NIAGARA MOHAWK POWER CORPORATION,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

PETITION FOR A WRIT OF CERTIORARI

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Question Presented

Whether the Department of Environmental Conservation, when evaluating hydroelectric projects under Section 401 of the federal Clean Water Act, is limited to considering the water quality standards approved by the United States Environmental Protection Agency under § 303 of the Clean Water Act.

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No.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1993.

NEW YORK STATE DEPARTMENT OF ENVIRONMENTAL CONSERVATION, COMMISSIONER THOMAS C. JORLING, and DEPUTY COMMISSIONER AND GENERAL COUNSEL MARC S. GERSTMAN,

Petitioners,

against

NIAGARA MOHAWK POWER CORPORATION,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

Petition for a Writ of Certiorari

Petitioners, the New York State Department of Environmental Conservation, its Commissioner, Thomas C. Jorling, and Deputy Commissioner and General Counsel Marc S. Gerstman (collectively, "the Department") respectfully request that this Court issue a writ of certiorari to review the

November 11, 1993, order issued by the New York State Court of Appeals. The order of the Court of Appeals is set forth as Appendix "A".

The Court of Appeals affirmed a January 7, 1993 order of the Appellate Division, Third Department, which held that the Department was limited to considering the water quality standards approved by the United States Environmental Protection Agency under § 303 of the Clean Water Act when evaluating applications for water quality certifications under § 401 of the Clean Water Act for hydroelectric projects.[1] The Court of Appeals rejected the Department's argument that the State could also consider State statutes protective of water quality.

Opinions Below

The Court of Appeals rendered its opinion on November 11, 1993. The opinion is reported at 82 NY 2d 191, 624 NE 2d 146, 604 NYS 2d 18. It is set forth as Appendix "B".

The Appellate Division, Third Department, rendered its opinion and order on January 7, 1993. The opinion is reported at 187 AD 2d 7, 592 NYS 2d 141 (3d Dept. 1993). It is set forth as Appendix "C". The original opinion and order of the Appellate Division, Third Department, is set forth as Appendix "D".

[1]Water quality standards consist of: (1) designated uses and (2) criteria necessary to protect them, together with (3) an antidegradation policy which protects: (a) existing instream uses and the level of water quality necessary to protect them, and (b) high quality waters -- those whose quality meets or exceeds the levels necessary to support the propagation of fish, shellfish, and wildlife and recreation in and on the water. 40 C.F.R. §§ 131.2, 131.3, 131.6, 131.12, 131.12(a)(1),(2).

The Supreme Court, Albany County, rendered its opinion on April 1, 1991. The opinion is not reported. It is set forth as Appendix "E". The order and judgment of the Supreme Court, Albany County, is set forth as Appendix "F".

Jurisdiction

The order of the Court of Appeals was entered on November 11, 1993. This petition for certiorari is filed within 90 days of November 11, 1993. The Court's jurisdiction to review the case rests upon 28 U.S.C. § 1257(a).

Statutory Provisions Involved

Clean Water Act § 401, 33 U.S.C. § 1341; New York Environmental Conservation Law ("ECL") Articles 8, 11, 24; ECL §§ 15-0501, 15-0503, 15-0505, 15-0507, 15-0801, *et seq.*, 15-2700 *et seq.* The full text of § 401 is set out in Appendix "G". ECL §§ 15-0501, 15-0503, 15-0505, and 15-0507 are also set forth in Appendix "G".

Statement of the Case

Facts and Procedural Background

This case involves the scope of the State's authority when acting under Section 401 of the Clean Water Act, 33 U.S.C. § 1341. Under that provision, federal agencies are prohibited from issuing licenses for activities which may discharge into navigable waters unless a State has issued a certification that the activity will not contravene State water quality requirements. Respondent Niagara Mohawk Power Corporation ("Niagara Mohawk") owns and operates a number of

hydroelectric projects licensed by the Federal Energy Regulatory Commission ("FERC") and therefore subject to the certification provision when renewal of the license is sought. Niagara Mohawk filed a May 24, 1990, administrative petition with the petitioner Department of Environmental Conservation requesting a declaratory ruling under the State Administrative Procedure Act whether the Department would, when considering applications for certifications, apply the provisions of ECL Article 15, Title 5 (§§ 15-0501 *et seq.*). Petitioner Marc S. Gerstman responded on behalf of the Department on August 27, 1990, that the Department would apply that statute as well as several others: ECL Article 24, Article 11, and Article 8, because they were protective of water quality.

On December 21, 1990, Niagara Mohawk commenced this lawsuit challenging the Department's August 27, 1990 determination. The Department answered and interposed objections. In a decision dated April 1, 1991, Supreme Court, Albany County, granted Niagara Mohawk's judicial petition and annulled the Department's determination. The court held that the Department can consider only the water chemistry standards set forth in Title 6 of the New York Code of Rules and Regulations ("NYCRR"), § 701.19 and § 704.2[2], but not the substantive provisions of various water quality-related sections of the ECL.

On July 30, 1991, the Department served and filed a timely notice of appeal. The Appellate Division, Third Department, affirmed the lower court, holding that the Department's review of 401 certifications was limited to consider-

[2]The material then contained in § 701.19 is now contained in 701.1 through 701.9 and 703.1 through 703.5.

ing the water quality standards approved by the United States Environmental Protection Agency ("EPA") under Section 303 of the Clean Water Act, 33 U.S.C. § 1313.

On December 15, 1993, the Department filed a timely motion for leave to appeal to the Court of Appeals. On May 11, 1993, the Court of Appeals granted that motion. On November 11, 1993, the Court of Appeals unanimously affirmed the order issued previously by the Appellate Division, Third Department.

REASONS FOR GRANTING THE PETITION

The Decision Of The New York Court Of Appeals Conflicts With The Decision Issued By The Supreme Court of Washington

The decision issued by New York's court of last resort, the New York Court of Appeals, conflicts with the decision issued by the State of Washington's court of last resort, the Supreme Court, in *PUD No. 1 of Jefferson County and City of Tacoma v. State of Washington, Department of Ecology, Department of Fisheries, and Department of Wildlife*, No. 92-1911, *cert. pet. granted* October 4, 1993, awaiting argument before this Court on February 23. In that case, in an alternative holding, the Washington court upheld the State's reliance on a State statute, not included within the State's water quality standards approved by EPA, to support the State's imposition of a minimum streamflow condition in a

water quality certification for a hydroelectric project.[3] The Washington statute mandated retention of a base flow in a river in order to protect the water's "uses and values for . . . propagation of fish and wildlife, recreational purposes . . . and [its] use for navigation". Revised Code of Washington ("RCW") 90.54.020(3)(a). The State's designated use of the river, under Washington's EPA-approved water quality standards, was fish migration, rearing, spawning, and harvesting. Washington Administrative Code ("WAC") 173-201-045(1)(b)(iii). Washington issued the certification but imposed a condition, authorized by Clean Water Act § 401(d), 33 U.S.C. § 1341(d), requiring a minimum streamflow. The hydroelectric project applicant sued, arguing that Washington exceeded its authority under the Clean Water Act because the Federal Power Act, 16 U.S.C. § 797 *et seq.*, gave FERC exclusive jurisdiction over streamflow regulation.

In contrast to Washington's highest court, New York's highest court held that the State cannot rely on a State statute not approved by EPA and therefore not a water quality standard when evaluating applications for water quality certifications. This Court should grant the writ and resolve the conflict.

---

[3]In its primary holding, the Washington court upheld the State's imposition of a minimum streamflow requirement because it was necessary to assure compliance with Washington's EPA-approved water quality standards. Washington's EPA-approved water quality standards included an antidegradation policy which prohibited degradation of existing instream uses and, in the absence of a minimum streamflow requirement, the existing fisheries use would be degraded. 849 P. 2d 646, 650.

The New York Court of Appeals erred in limiting the State to considering water quality standards because Clean Water Act § 401, as amended in 1972, authorizes States to assure compliance with water quality requirements, not just EPA-approved water quality standards. The State statutes on which New York wishes to rely are water quality requirements because they are protective of water quality. In addition, § 401(d) expressly authorizes States (and EPA when it acts in place of a State or in certain interstate situations) to impose conditions on certifications based on "any other appropriate requirements of State law", and the State statutes are such "appropriate requirements of State law".

1. The Plain Language And The Legislative History Of The Clean Water Act Support A Broader View Of State Water Quality Requirements Than Was Adopted By The New York Court Of Appeals

State water quality-protective statutes are "water quality requirements" within the meaning of Section 401 of the Clean Water Act, as amended in 1972. Consequently, a State may look to and rely on such a statute when evaluating an application for a water quality certification.

Originally enacted as Section 21(b) of the Water Quality Improvement Act of 1970 and limited to water quality standards, the certification requirement was amended by the Federal Water Pollution Control Act Amendments of 1972 to change the operative language from "standards" to "requirements" and thus broaden the State's authority. Water Quality Improvement Act of 1970, Pub. L. No. 91-224, § 21(b), 84 Stat. 91 (1970); Pub. L. No. 92-500, 86 Stat. 816 (1972). Furthermore, the amended Section 401 contains a provision for which there was no precedent in Section 21,

Section 401(d), and that provision is not only not limited to water quality standards, a term it does not mention, but contains the broadest language of all. *See*, 33 U.S.C. § 1341(d).

The 1972 amendments, incorporating Congress' moving away from focussing on water quality standards and taking a broader view of water pollution, substituted the term "water quality requirements" for the term "water quality standards" found in Section 21(b). *Compare*, former 33 U.S.C. § 1171(b), referred to as "Section 21(b)", with existing 33 U.S.C. § 1341, referred to as "Section 401". With changes in the language from "water quality standards" to "water quality requirements", Section 21(b)(1) corresponds to Section 401(a)(1); Section 21(b)(2) corresponds to Section 401(a)(2); Section 21(b)(3) corresponds to Section 401(a)(3); Section 21(b)(4) corresponds to Section 401(a)(4); Section 21(b)(5) corresponds to Section 401(a)(5); Section 21(c) corresponds to Section 401(b); Section 21(d) corresponds to Section 401(c).

The term "water quality requirement" is not defined in the Clean Water Act. A request that it be defined narrowly was rejected. Then-EPA Administrator William Ruckelshaus, in a 1971 statement to the House Committee on Public Works, suggested that the term "applicable water quality requirement" (the phrase then contained in the version previously passed by the Senate) be defined to mean:

> any applicable effluent limitations under Section 301 or 302 of this Act, or prohibition, effluent standard, or pretreatment standard under Section 307 of this Act, or any more stringent water quality requirement

> under State law as provided in Section 510 of this Act.[4]

2 *Legislative History of the Water Pollution Control Act Amendments of 1972* p. 1204 (1973). The Committee chose not to adopt the definition. In addition, after consultations between both houses, Congress agreed to pass the House version, which substituted the broad phrase, "any other appropriate requirement of State law" for the phrase "any applicable water quality requirement". *Ibid.* Rejection of the suggestion that a narrow definition be codified and adoption of even broader language is evidence that Congress did not intend such a narrow construction.

2. The State Statutes Are Water Quality Related And Come Within The Scope Of The Authorization Contained In Section 401 Of The Clean Water Act

Section 401(d) authorizes imposition of conditions on certifications based on "any other appropriate requirements of State law". In addition to being water quality requirements, the water quality protective statutes upon which New York relies are also "appropriate requirements of State law". Section 401(d) provides:

> Any certification provided under this section shall set forth any effluent limitations and other limitations, and monitoring requirements necessary to as-

[4]Section 510, 33 U.S.C. § 1370, provides that nothing in the Clean Water Act "shall (1) preclude or deny the right of any State...to adopt or enforce...any requirement respecting control or abatement of pollution...or (2) be construed as impairing or in any manner affecting any right or jurisdiction of the states with respect to the waters...of such states."

> sure that any applicant for a Federal license or permit will comply with any applicable effluent limitation and other limitations, under section 301 or 302 of this Act, standard of performance under section 306 of this Act, or prohibition, effluent standard, or pretreatment standard under section 307 of this Act, and with any other appropriate requirement of State law set forth in such certification, and shall become a condition on any Federal license or permit subject to the provisions of this section.

The 1972 Senate Committee Report described the enactment of § 401(d) as follows:

> [T]he provision makes clear that any water quality *requirements* established under State law, more stringent than those requirements established under this Act, also shall through certification become conditions on any Federal license or permit. The purpose of the certification mechanism provided in this law is to assure that Federal licensing or permitting agencies cannot override State water quality *requirements*.

S. R. Rep. No. 92-414, 92d Cong., 2d Sess., *reprinted in* 2 U.S. Code Cong. and Admin. News 3735 (1972) (emphasis added). The Senate Conference Report also stated:

> Subsection (d), which requires a certification to set forth effluent limitations, other limitations, and monitoring requirements necessary to insure compliance with sections 301, 302, 306, and 307, of this Act, *has been expanded to also require compliance*

> *with any other appropriate requirement of State law which is set forth in the certification.*

S. Conf. Rep. No. 92-1236, 92nd Cong., 2nd Sess., *reprinted in* 2 U.S. Code Cong. & Admin. News 3815 (1972) (emphasis added).

Unlike Congress, the New York Court of Appeals failed to recognize that water quality is broader than mere water quality standards alone. Water quality standards alone, no matter how broadly drafted, do not provide sufficient protection for the State's water resources and the uses of those resources when hydroelectric facilities are involved. Dissolved oxygen and bacteria content, for example, by themselves are only technical measurements and only indirectly reflect the fundamental values of water quality protection. The Clean Water Act's purpose of improving and maintaining the quality of the nation's waters is not fulfilled by a State simply applying its water quality standards to a hydroelectric project. Adoption of the narrow view expressed by the court below reduces the State's involvement in the water quality certification process to that of a laboratory technician. This is not what Congress had in mind when it enacted the Clean Water Act to protect and improve water quality.

> The objective of this Act is to restore and maintain the chemical, physical and biological integrity of the Nation's waters. In order to achieve this objective, it is hereby declared that, consistent with the provisions of this Act . . .

> *(2) it is the national goal that whenever attainable, an interim goal of water quality which provides for the protection and propagation of fish, shellfish and wildlife and provides for recreation in and on the water be achieved by July 1, 1983 . . .*

33 U.S.C. § 1251(a) (emphasis added).

The substantive water quality requirements of ECL Articles 11, 15, and 24 are important factors for the Department's determination a hydroelectric project will comply with State water quality requirements. Each of these statutes contains provisions protective of water quality and contributes to the fulfillment of the Department's responsibility to protect the State's water quality. They protect the State's water quality by providing a basis for the Department to review proposed projects that may affect water quality in a variety of ways.

ECL § 15-0501, entitled, "Protection of Waters: Stream Disturbance", generally regulates projects which will disturb stream beds and thereby affect the water quality of the stream. Where an application for a Section 401 certification for a hydroelectric project is involved, the substantive provisions of the statute enable the Department to review an applicant's plans so as to minimize the disturbance of a stream and prevent erosion and increased turbidity of the waters. *See*, ECL § 15-0501(3)(b). Each is a water quality concern.

Dam construction, repair, or reconstruction activities may affect the waters of the State through the discharge of

pollutants into the water, including materials used during the construction, repair, or reconstruction. These activities also have the potential to affect aspects of the State's water quality by causing turbidity, erosion, temperature change, and the destruction of wetlands which improve and maintain water quality by cleansing the waters.[5] Because these are water quality concerns, the Department considers the substantive provisions of ECL § 15-0503, entitled "Protection of Waters: Dam Construction, Repair, or Reconstruction" when reviewing Section 401 certification requests.[6]

Hydroelectric projects usually require excavation and/or fill as a part of construction, repair, or reconstruction activities. Excavation and fill may affect the waters of the State through the discharge of pollutants into the waters, the creation of turbidity, erosion, and temperature changes, and the impact on protected freshwater wetlands. These are water quality concerns. Consequently, the Department considers the substantive provisions of ECL § 15-0505, entitled "Protection of Waters: Excavation and Fill".

ECL § 15-0507, entitled "Structures Impounding Waters; Inspection", empowers the Department to inspect dams and order repair or reconstruction activities in order to "protect

[5]As discussed below, destruction of wetlands can affect water quality.

[6]Turbidity and temperature change are the only categories for which specific water chemistry standards have been promulgated. 6 NYCRR § 703.3; 6 NYCRR Part 704. The other concerns would thus go unaddressed, even though they are valid water quality concerns, if the Department's review were limited to applying the water chemistry standards. They would thereby be excluded under the holding of the court below, leaving a void rather than a framework for addressing legitimate and serious water quality concerns.

the natural resources of the State", including the waters of the State. ECL § 15-0507(4). Remedial action undertaken pursuant to this section can affect the waters of the State through the discharge of pollutants, the creation of turbidity, erosion, and temperature change, and the destruction of wetlands. The Department, therefore, considers the substantive provisions of ECL § 15-0507 when reviewing 401 certification applications because that section addresses water quality concerns and protection of the waters of the State.

ECL § 15-0805, entitled "Regulation of Reservoir Releases", authorizes the Department to regulate reservoir releases (*i.e.*, the release of water from reservoirs) in order to protect recreational uses of water and to insure sufficient water supplies for drinking and power production uses. ECL § 15-0801(2). Since hydroelectric projects can affect the safety of a water supply, the Department properly considers the substantive provisions of ECL § 15-0805, entitled "Reservoir Releases" when reviewing 401 certification applications. A reservoir is a designated protected use under the system established by Congress in the Clean Water Act, the regulations interpreting that statute by the United States Environmental Protection Agency, and the Department's regulations. 33 U.S.C. § 1313(c)(2); 40 C.F.R. § 131.10, § 131.11, and § 131.12; 6 NYCRR §§ 701.2-701.6.

The regulations promulgated to implement the Wild, Scenic, and Recreational Rivers system under ECL § 15-2701 *et seq.*, entitled "Wild, Scenic, and Recreational Rivers Systems", are designed to protect "outstanding natural, scenic, ecological, recreational, aesthetic, botanical, geological, hydrological, fish and wildlife, historical, cultural, archaeological and scientific values" by preserving the free flowing condition of such rivers and protecting their imme-

diate environs for the benefit and enjoyment of present and future generations. ECL § 15-2701; *See also*, 6 NYCRR § 666.1. The construction of hydroelectric projects on rivers included in the Wild, Scenic, and Recreational Rivers System may result in unmitigatable adverse environmental impacts to the very attributes that contribute to the protected designation.

The construction of hydroelectric projects may have an impact on protected freshwater wetlands and therefore may result in the degradation of water quality. ECL § 24-0101 *et seq.*, the State's Freshwater Wetlands Law, has as its express purpose the preservation and protection of freshwater wetlands and the benefits derived from them. *See*, ECL § 24-0103. In enacting that statute, the Legislature stated that freshwater wetlands are "an invaluable resource for flood protection, wildlife habitat, open space and *water resources*". ECL § 24-0105(1) (emphasis supplied.) The statute expressly recognizes that any loss of wetlands will also result in the loss of subsurface water resources, environmental provisions for watersheds, recharging areas for ground water supplies, pollution treatment basins, erosion control sedimentation areas, filtering basins, absorption areas for silt and organic matters, sources of nutrients for fish and wildlife, and wildlife habitat. ECL § 24-0105(7)(a)(i). Because loss of any of these may adversely affect water quality, the Department takes the water quality aspects of this statute into consideration.

ECL § 11-0101 *et seq.*, the State's Fish and Wildlife Law, authorizes the Department to protect and manage fish and wildlife resources within the State. A primary purpose behind enactment of the Clean Water Act was restoration of the quality of the nation's waters so that they would be

"*fishable*, swimmable waters" by 1983. *See*, 33 U.S.C. § 1251(a)(2), where § 101(a)(2) of the Clean Water Act states that its objective is to "restore and maintain the chemical, physical, and biological integrity of the Nation's waters". 33 U.S.C. § 1251(a). In its regulations interpreting the Clean Water Act, and specifically interpreting the "water quality standards" portion of the Clean Water Act, EPA has taken the position, on which New York relies, that the standards provide for the protection and propagation of fish. 40 C.F.R. § 131.2; 6 NYCRR §§ 701.3-701.8. Hydroelectric projects have the potential to disrupt not only fish and wildlife habitats, but the "minimum flows" or quantity of water needed for fish and wildlife survival. Water passing through a particular river reach can be greatly affected because of the diversion of water into turbines to create power. Wildlife habitat and endangered species can be destroyed if insufficient flow protection for fish and wildlife are not included in a hydroelectric project design plan. Consequently, depending upon the particular factual record developed in a particular case, New York may wish, for example, to impose conditions regulating flow levels in its certifications where necessary to attain or prevent impairment of the designated uses for waters whose designated uses include the survival and propagation of fish, as did the State of Washington in the *PUD No. 1 of Jefferson County and City of Tacoma v. State of Washington Department of Ecology, Department of Fisheries, and Department of Wildlife* case now awaiting argument before this Court.

The Department's approach to Section 401 certification is consistent with the position taken by the EPA that the protection of water quality involves more than just addressing the water quality standards contained in 6 NYCRR Parts 701-704, and that States should address "aquatic life,

wildlife, wetlands and other aquatic habitat, vegetation and hydrology required to maintain the aquatic system...toxicity and bioaccumulation of pollutants, diversity and composition of aquatic species, entrapment of pollutants in sediment, stormwater and nonpoint source impacts, habitat loss, and hydrologic changes". *See also*, 40 C.F.R. §§ 130, 131, and especially § 130.3, wherein EPA describes "water quality standards" as defining the water quality goals of a water body, or portion thereof, by designating the use or uses to be made of the water and by setting criteria necessary to protect the uses".

In a letter to FERC, EPA has noted that:

> protection of water quality involves far more than just addressing water chemistry. Rather, *protection of water quality includes protection of multiple elements which together make up aquatic systems including the aquatic life, wildlife, wetlands and other aquatic habitat, vegetation, and hydrology required to maintain the aquatic system. Relevant water quality issues include the toxicity and bioaccumulation of pollutants, the diversity and composition of the aquatic species, entrapment of pollutants in sediment, stormwater and nonpoint source impacts, habitat loss, and hydrologic changes. A State may need to address any one or combination of these factors in particular circumstances in order to meet the mandates of the Clean Water Act articulated in section 101(a) 'to restore and maintain the chemical, physical, and biological integrity of the nation's waters'.*

(emphasis added). EPA's interpretation, as the agency responsible for administration of the Clean Water Act, is

entitled to deference. *Arkansas v. Oklahoma*, 503 U.S. ____, 112 S.Ct. 1046, 1060 (1992); *Chevron U.S.A. v. Natural Resources Defense Council*, 467 U.S. 837, 844 (1983).

Finally, the New York Court of Appeals' opinion turned on the court's belief that the Federal Power Act, 16 U.S.C. § 797 *et seq.*, preempts the State from applying its State water quality statutes during the water quality certification process for hydroelectric facilities licensed by the Federal Energy Regulatory Commission. The Court was wrong in finding preemption because the Commission has not acted. Thus, any finding of preemption is not ripe. *See*, brief filed for the United States as *amicus curiae* supporting affirmance in *PUD No. 1 of Jefferson County and City of Tacoma v. State of Washington, Department of Ecology, Department of Fisheries, and Department of Wildlife*, No. 92-1911, pp. 22-29, to be argued February 23, 1994. Once the Commission has acted, assuming its determination conflicts with that of the State, its "determination can be judicially reviewed based on a full administrative record and a concrete controversy. *Compare*, *Escondido Mutual Water Co. v. La-Jolla Band of Mission Indians*, 466 U.S. 765, 772-779 (1984)." Br. for the United States as *amicus curiae*, p. 29.

Conclusion

This case raises an important issue which was wrongly decided by New York's highest court. The Court of Appeals' construction of Section 401 of the Clean Water Act conflicts with the construction given that statute by the State of Washington's highest court, the Supreme Court. For the reasons stated, this Court should grant the writ.

Respectfully submitted,

G. OLIVER KOPPELL
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APPENDIX A—Order of the New York State Court of Appeals.

COURT OF APPEALS

STATE OF NEW YORK

The Hon. Judith S. Kaye, Chief Judge, Presiding

3 No. 214

In the Matter of

NIAGARA MOHAWK POWER CORPORATION,

Respondent,

v.

NEW YORK STATE DEPARTMENT OF ENVIRONMENTAL CONSERVATION, *et al.*,

Appellants.

The appellants in the above entitled appeal appeared by Hon. Robert Abrams, Attorney General of the State of New York; the respondent appeared by Hiscock & Barclay, Esqs., Brian K. Billinson, Esq., Senior Counsel, Niagara Mohawk

and Swidler & Berlin; and *amicus curiae* appeared by Richard Roos-Collins, Esq.

The Court, after due deliberation, orders and adjudges that the order is affirmed, with costs. Opinion by Judge Bellacosa. Chief Judge Kaye and Judges Simons, Titone, Smith and Levine concur. Judge Hancock took no part.

The Court further orders that this record of the proceedings in this Court be remitted to the Supreme Court, Albany County, there to be proceeded upon according to law.

I certify that the preceding contains a correct record of the proceedings in this appeal in the Court of Appeals and that the papers required to be filed are attached.

/s/DONALD M. SHERAW
Clerk of the Court

Court of Appeals, Clerk's Office, Albany, November 11, 1993.

APPENDIX B—Opinion of New York State Court of Appeals.

In the Matter of NIAGARA MOHAWK POWER CORPORATION, Respondent, v NEW YORK STATE DEPARTMENT OF ENVIRONMENTAL CONSERVATION et al., Appellants.

Argued October 7, 1993; decided November 11, 1993

SUMMARY

APPEAL, by permission of the Court of Appeals, from an order of the Appellate Division of the Supreme Court in the Third Judicial Department, entered January 7, 1993, which affirmed a judgment of the Supreme Court (Harold J. Hughes, Jr., J.), entered in Albany County in a combined proceeding pursuant to CPLR article 78 and action for a declaratory judgment, denying a motion by respondents to dismiss the petition on objections in point of law, converting the CPLR article 78 proceeding to a declaratory judgment action, annulling a ruling of respondent New York State Department of Environmental Conservation that certain provisions of ECL article 15 are applicable in assessing issuance of a Clean Water Act § 401 certification, preempting respondents from applying those provisions of ECL article 15 as well as ECL articles 8, 11 and 24 in assessing such certification applications, and limiting respondents to considering only the water quality standards set forth in 6 NYCRR 701.19 and 704.2 in assessing such applications.

Matter of Niagara Mohawk Power Corp. v New York State Dept. of Envtl. Conservation, 187 AD2d 7, affirmed.

HEADNOTE

Environmental Conservation — Water Quality Certification — Hydroelectric Power Projects — Federal Preemption — Scope of Review of Department of Environmental Conservation

For purposes of issuance of a Clean Water Act § 401 (33 USC § 1341) State certification that any discharge into navigable waters will comply with the applicable provisions of the Clean Water Act, the New York State Department of Environmental Conservation (DEC) is limited to considering the water quality standards set forth by the State and approved by the United States Environmental Protection Agency under section 303 of the Clean Water Act (33 USC § 1313), which are found only in 6 NYCRR parts 701-704. Accordingly, with respect to section 401 certification of certain hydroelectric facilities, DEC may not broaden its scope of review under the Clean Water Act to include aspects of ECL article 15.

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By the Publisher's Editorial Staff

Am Jur 2d, Pollution Control, §§ 141, 154.
CLS, ECL art 15.
33 USCS §§ 1313, 1341.
NY Jur 2d, Environmental Rights and Remedies, §§ 106-120.

ANNOTATION REFERENCE

See ALR Index under Federal Water Pollution Control Act; Water Pollution.

POINTS OF COUNSEL

Robert Abrams, Attorney-General, Albany *(Kathleen Liston Morrison, Jerry Boone* and *Peter H. Schiff* of counsel), for appellants. The Department has the power to consider water quality impacts beyond water chemistry standards when evaluating applications for water quality certifications under section 401 of the Clean Water Act. *(Monongahela Power Co. v Marsh,* 809 F2d 41, 484 US 816; *Keating v Federal Energy Regulatory Commn.,* 927 F2d 616; *United States v Marathon Dev. Corp.,* 867 F2d 96; *Matter of Long Lake Energy Corp. v New York State Dept. of Envtl. Conservation,* 164 AD2d 396; *Lake Erie Alliance for Protection of Coastal Corridor v U. S. Army Corps of Engrs.,* 526 F Supp 1063, 707 F2d 1392, 464 US 915; *Roosevelt Campobello Intl. Park Commn. v United States Envtl. Protection Agency,* 684 F2d 1041; *United States Dept. of Interior v Federal Energy Regulatory Commn.,* 952 F2d 538.)

Brian K. Billinson, Syracuse, *Hiscock & Barclay,* Albany *(Timothy P. Sheehan* of counsel), and *Swidler & Berlin (Kenneth G. Jaffe* and *Joel deJesus* of counsel, of the District of Columbia Bar, admitted *pro hac vice),* for respondent. I. The Court below correctly held that the Federal Power Act establishes a comprehensive scheme of Federal regulation of hydroelectric projects that, with limited exceptions, preempts State regulation of hydroelectric facilities within the Federal Energy Regulatory Commission's jurisdiction. *(First Iowa v Power Commn.,* 328 US 152; *Udall v Federal Power Commn.,* 387 US 428; *Calvert Cliffs' Coordinating Comm. v United States Atomic Energy Commn.,* 449 F2d 1109; *California v*

Federal Energy Regulatory Commn., 495 US 490; *Sayles Hydro Assocs. v Maughan*, 985 F2d 451; *Matter of Power Auth. v Williams*, 60 NY2d 315.) II. The Court below correctly held that the "very limited" authority delegated to the States under section 401 of the Clean Water Act does not extend the myriad State law provisions that DEC has sought to apply. (*Matter of Power Auth. v Williams*, 60 NY2d 315; *Cleveland v United States*, 329 US 14; *People v Shapiro*, 50 NY2d 747; *Matter of de Rham v Diamond*, 32 NY2d 34; *Fourth Branch Assocs. v Department of Envtl. Conservation*, 146 Misc 2d 334; *Matter of Long Lake Energy Corp. v Department of Envtl. Conservation*, 164 AD2d 396.) III. The panoply of statutes and regulations that DEC seeks to apply are not water quality standards under section 303 of the Federal Water Pollution Control Act and, therefore, are outside the scope of section 401. (*Matter of Power Auth. v Williams*, 60 NY2d 315; *California v Federal Energy Regulatory Commn.*, 495 US 490; *Matter of Jackson v New York State Urban Dev. Corp.*, 67 NY2d 400; *National Fuel Gas Supply Corp. v Public Serv. Commn.*, 894 F2d 571, 497 US 1004.)

Richard Roos-Collins and *Jessica Notini*, of the California Bar, admitted *pro hac vice*, for New York Rivers United and others, *amici curiae*. I. The Federal Power Act does not preempt DEC's enforcement of water quality standards. II. The Court below erred in holding that fish, wildlife, and recreation are not regulated under the Clean Water Act. (*Matter of de Rham v Diamond*, 32 NY2d 34; *Fourth Branch Assocs. v Department of Envtl. Conservation*, 146 Misc 2d 334; *Matter of Long Lake Energy Corp. v New York State Department of Envtl. Conservation*, 164 AD2d 396; *Matter of Power Auth. v Williams*, 60 NY2d 315.) III. The Court below erred in holding that section 401 (d) conditions on certification are limited to Federally approved State laws.

OPINION OF THE COURT

BELLACOSA, J.

The New York State Department of Environmental Conservation (DEC) appeals by leave granted from this Court to review the Appellate Division's order affirming Supreme Court's judgment in favor of Niagara Mohawk Power Corporation. We agree with both courts that the DEC's effort to broaden its scope of review under the Clean Water Act to include aspects of ECL article 15 is unfounded. For purposes

of issuance of a Clean Water Act § 401 (33 USC § 1341) State certification, DEC is limited to considering the water quality standards set forth by the State and approved by the United States Environmental Protection Agency under section 303 of the Clean Water Act (33 USC § 1313). We are satisfied that Federal preemption principles and policies along with settled precedents interpreting the complementary statutory scheme of Federal-State regulatory authority support an affirmance of the Appellate Division order.

I.

Niagara Mohawk, a private investor-owned utility company licensed under the Federal Power Act, owns and operates hydroelectric facilities throughout the State. It applied to the Federal Energy Regulatory Commission (FERC) for a license to approve construction of several new facilities, dam repair and reconstruction work on existing dams and anticipates filing similar applications in the future.

Under section 401 of the Federal Clean Water Act, before approval of a Federal license, a facility must obtain a "certification" from the State regulatory entity—in this case, the DEC—that the discharge from the new or altered facility meets with relevant State water quality standards. Basically, water quality standards are provisions of State and Federal law, which define the quality goals of a water body or some portion of it, by designating the use or uses to be made of the water, by setting criteria necessary to protect the uses, and by incorporating an antidegradation policy designed to prevent the gradual deterioration of the quality of the water body. These criteria are elements of State water quality standards, expressed as constituent levels or narrative statements, representing a quality of water that supports a particular use. States adopt a broad array of water quality standards to protect the public health or welfare, enhance the quality of water and serve the purposes of the Clean Water Act, which, in turn, serve to protect fish, wildlife, recreational use and, ultimately, aid in the use of the water for public water supply.

Niagara Mohawk did not apply for a State section 401 certification and, instead, initiated a threshold challenge alleging that DEC has officially declared its intent and jurisdiction to review Niagara Mohawk's applications under ECL article 15 in super arrogation of the Federal Power Act. Niagara Mohawk proceeded by application to DEC in May 1990 pursu-

ant to section 204 of the State Administrative Procedure Act for a declaratory ruling that ECL article 15, title 5 is not applicable to a section 401 certification, and that the Federal Power Act (16 USC § 791a *et seq.)* preempts and limits DEC's reviewing scrutiny to specific State provisions as they pertain to the question of whether the project will affect the State's water quality as prescribed in 6 NYCRR parts 701 to 704.

By letter opinion dated August 27, 1990, DEC declared that projects proposed by Niagara Mohawk must also satisfy multiple provisions of the Environmental Conservation Law, including the regulatory requirements of the State Environmental Quality Review Act (ECL art 8) before it will issue the requisite Clean Water Act § 401 certification.

DEC opined that by enacting section 401, Congress intended the States to have authority to exact compliance with all State laws which bear on water quality before granting a certification. DEC declared the following laws to be applicable in assessing issuance of the "certification" under a section 401 review:

(a) Protection of Waters: disturbance of stream beds (ECL 15-0501);

(b) Protection of Waters: dam construction (ECL 15-0503);

(c) Protection of Waters: excavation or fill (ECL 15-0505);

(d) Dam Safety (ECL 15-0507);

(e) Reservoir Release (ECL 15-0801 *et seq.);*

(f) Wild, Scenic and Recreational River System (ECL 15-2701 *et seq.);*

(g) Freshwater Wetlands (ECL art 24);

(h) Fish and Wildlife (ECL art 11); and

(i) Environmental Quality Review (ECL art 8).

Niagara Mohawk invoked CPLR article 78 review and brought a declaratory judgment action seeking annulment of DEC's ruling. Its requested relief included a determination that the Clean Water Act § 401 certification process allows the DEC, from the State law's standpoint and involvement, to consider the water quality standards set forth only in 6 NYCRR 701.19 and 704.2.

Supreme Court granted judgment to Niagara Mohawk, allowing only a " 'determination that a proposed project will meet the particular water quality standards for the applicable

classification.' " Supreme Court limited DEC to review under 6 NYCRR 701.19 and 704.2, recodified in substantially the same form and contained within 6 NYCRR parts 701 to 704 (eff Sept. 1, 1991). The Appellate Division affirmed, holding DEC was restricted to the application of turbidity and temperature change as specified by 6 NYCRR 701 to 704 and concluding that it could not impose additional water quality analysis conditions to its section 401 certification.

II.

We agree with the Appellate Division that the Federal Power Act establishes a comprehensive scheme of Federal regulation of hydroelectric projects that essentially preempts State regulation of hydroelectric facilities within the Federal Energy Regulatory Commission's jurisdiction. Settled law in New York has consistently supported the view that section 401 gives the State regulatory entity only a limited role of review, based on requirements affecting water quality, not on all State water quality provisions. Review by State agencies that would overlap or duplicate the Federal purview and prerogatives was not contemplated and would infringe on and potentially conflict with an area of the law dominated by the nationally uniform Federal statutory scheme.

Niagara Mohawk's hydroelectric projects are subject to regulation under part I of the Federal Power Act, which vests in the FERC comprehensive authority over the construction, operation and maintenance of hydroelectric facilities located on the navigable waters of the United States (16 USC § 797 [e]; § 817 [1]). FERC is required to evaluate and ensure that a given project is founded on a comprehensive plan for the adequate protection and enhancement of wildlife and beneficial public uses, including irrigation, flood control and recreational use (16 USC § 803 [a] [1]; § 797 [e]; Electric Consumers Protection Act, added by Pub L 99-495, 100 US Stat 1243).

In addition, Niagara Mohawk's projects are controlled by the Clean Water Act, which in "anticipat[ing] a partnership between the States and the Federal Government" (*Arkansas v Oklahoma*, 503 US —, —, 112 S Ct 1046, 1054), establishes a system for effluent restrictions applicable to different categories of sources of water pollution (33 USC §§ 1311, 1312, 1313, 1316 and 1317), and defines the role for the States in controlling water pollution.

Under section 303 of the Clean Water Act (33 USC § 1313),

States are authorized to establish "water quality standards" consisting of the "designated uses of the navigable waters involved and the water quality criteria for such waters based upon such uses" (33 USC § 1313 [c] [2] [A]). DEC concedes that in New York the water quality standards promulgated pursuant to Clean Water Act § 303 are found only in 6 NYCRR parts 701 to 704. That tie-in is highly relevant.

Section 401 of the Clean Water Act also serves as the conduit for the incorporation of relevant State water quality standards in this otherwise Federally filled universe. An applicant for a Federal license or permit authorizing an activity that may result in a discharge into navigable waters must provide "a certification from the State in which the discharge originates or will originate * * * that any such discharge will comply with the applicable provisions of sections 301, 302, 303, 306, and 307 of [the Clean Water Act]" (33 USC § 1341 [a] [1]). The State must act on a request for certification within a reasonable time of receipt, and if the State denies the certification, the Federal agency may not issue the license or permit.

III.

In 1973, *Matter of de Rham v Diamond* (32 NY2d 34) held that section 21 (b) of the Federal Water Pollution Control Act (33 USC former § 1171 [b]):

> "[R]elinquishes only one element of the otherwise exclusive jurisdiction granted the Power Commission by the Federal Power Act. It authorizes States to determine and certify only the narrow question whether there is 'reasonable assurance' that the construction and operation of a proposed project 'will not violate applicable water quality standards' * * * Congress did not empower the States to reconsider matters, unrelated to their water quality standards" *(id.,* at 44).

Nevertheless, DEC relies heavily on a replacement of section 21 by the Federal Water Pollution Control Act Amendments, later codified as section 401 of the Clean Water Act (33 USC § 1341), as indicating a new and different approach by Congress. It suggests that Congress was shifting focus away from the quality of a given body of water to a greater emphasis on regulating the discharge of effluent and pollution at its source, and somehow that this was designed to release some of

the exclusive Federal power to the States. These amendments in 1972, however, had no impact on this Court's decision in *de Rham*. Nor did these amendments impress this Court 10 years later in 1983, when, in *Matter of Power Auth. v Williams* (60 NY2d 315, 326-327), we again held that the new section 401 certification process is still accomplished by a determination that a proposed project will meet the particular water quality standards related to the applicable classification *(see also, Matter of Long Lake Energy Corp. v New York State Dept. of Envtl. Conservation*, 164 AD2d 396, 401-403). Thus, the Appellate Division correctly noted that under settled New York law, such a broad reach is beyond DEC's limited delegated powers.

The DEC determination of August 27, 1990, under review in this case, would have a section 401 applicant supply information only indirectly related to water quality. It seeks to change the thrust of analysis and the force of our precedents by asserting that section 401 today is different in its impact and relationship to the States because of the Clean Water Act. In effect, DEC asks this Court to open the dam of section 303 with respect to the section 401 certification process. DEC insists that by altering the wording of section 1341 in 1972 and then again in 1977 when creating the Clean Water Act, Congress returned to the States plenary power over water quality, eliminating its earlier preemption prerogatives under the 1935 Federal Power Act. Part of its argument turns on the fact that Congress's decision not to include a limiting reference to section 303 (water quality standards) in section 401 (d), which deals with a State's power to impose conditions on a certification, indicates that Congress did not mean to restrict conditions on certifications only to those necessary to assure compliance with section 303 water quality standards. This is especially so, it argues, since Congress did reference section 303 in section 401 (a) (1), (3), (4) and (5) and omitted it from section 401 (d).

To support this highly significant turnabout in law and policy and in the distribution of exclusive and complementary Federal-States power, DEC also points us to *State of Washington v Public Utility Dist. No. 1* (121 Wash 2d 179, 849 P2d 646 [1993], *cert granted* — US —, 114 S Ct 55). To be sure, the Washington Supreme Court, in construing section 401 (d), has enunciated a broader view of its State's authority under that provision. The Supreme Court of Washington considered the language Congress chose within the context of the Clean Water Act itself, noting Congress's "broad purpose" in enact-

ing the Clean Water Act "to restore and maintain the chemical, physical, and biological integrity of the Nation's waters" *(id.,* 121 Wash 2d, at 189, 849 P2d, at 651). The court, therefore, broadly construed the power granted to the States under its view of section 401 because the Clean Water Act stated its purpose in broad terms. "This broad purpose suggests that what state laws qualify as 'appropriate' for purposes of section 401 (d) should also be understood broadly" *(id.,* 121 Wash 2d, at 189, 849 P2d, at 651-652). The court then noted:

> "If Congress intended to refer only to state water quality standards [in section 401 (d)], it could have specifically referred to them. That Congress did not do so is evidence that it intended the phrase 'any other appropriate requirement of State law' to refer broadly to all state water quality-related laws, not just to state water quality standards adopted pursuant to section 303 [of the Clean Water Act, 33 USC § 1313]" *(id.,* 121 Wash 2d, at 190, 849 P2d, at 652).

This same type of analysis has been followed by the Oregon intermediate appellate court in *Arnold Irrigation Dist. v Department of Envtl. Quality* (79 Ore App 136, 717 P2d 1274, 1279, *review denied* 301 Ore 765, 726 P2d 377 [1986]). Whatever the outcome in the Supreme Court of the United States, we respectfully reach a different conclusion from those courts based on our analysis and our precedents.

DEC claims that the replacement of section 21 by section 401 (d) by Congress in 1972 which changed the phrase "applicable water quality standards" to the broader phrase "any other appropriate requirement of State law" (33 USC § 1341 [d]; *see also,* Senate Conference Report No. 92-1236 accompanying S 2770 [enacted as Pub L 92-500], *reprinted in* 1972 US Code Cong & Admin News 3776, 3815) dictates a conclusion that a section 401 review encompasses all applicable State water quality standards. One initial problem with this phase of the argument that persuades us to reject this view is that section 401 (d) does not control the analysis or outcome here. That subdivision applies only to the conditioning authority on a certificate issued by DEC. DEC's enlarged reading of "appropriate requirement of State law" under section 401 (d) would enable DEC to impose onerous conditions that could contradict or undermine Federal licensing by superimposing unrelated conditions not within the EPA mandates and specifications.

Such a strained construction would countermand the carefully worded authority of section 401 (a) (1). To permit DEC, through the conditioning power of subdivision (d), to usurp the authority that Congress reserved for FERC under the Federal Power Act, over issues beyond water quality standards directly relevant to the section 401 certification process, is not justified and would constitute unfounded statutory construction.

The Clean Water Act reads simply that a certification shall issue if a determination is reached "that any such discharge will comply with the applicable provisions of sections 301, 302, 303, 306, and 307 of this Act" (33 USC § 1341 [a] [1]). Unlike the EPA-issued effluent limitations and new source performance standards mentioned in section 401 (a) (1) *(see,* 33 USC §§ 1311, 1312, 1316, 1317), section 303 water quality standards are promulgated by each State *(see,* 33 USC § 1313), but even section 303 standards must be approved by EPA through a process delineated in section 303 (33 USC § 1313 [c]).

DEC concedes that in New York the water quality standards promulgated pursuant to section 303 are linked and found only in 6 NYCRR parts 701 to 704. Thus, there is nothing in the new language or legislative history of section 401 that would empower DEC to deny certification on the basis of broader environmental provisions of New York law or regulation, nor is there adequate support for DEC's contention that the operation and reach of section 401 has been altered in a way that requires this Court to upset its settled analysis and resolution of the interrelated questions in *Matter of de Rham v Diamond* (32 NY2d 34, *supra)* and *Matter of Power Auth. v Williams* (60 NY2d 315, *supra).*

Additional support for our conclusion may be found in the Congressional expression when it amended section 401 in the Senate Report that "it is reasonable to require that Federal permits and licenses should take into account State water quality plans, standards and requirements adopted under section 303 to assure maintenance of water quality in the respective States" (Senate Report No. 95-370, accompanying S 1952 [Pub L 95-217], at 72-73, *reprinted in* 1977 US Code Cong & Admin News 4397-4398).

Therefore, while DEC is correct that Congress sought in section 401 to preserve the States' role in maintaining water quality, Congress simultaneously maintained essentially preemptive Federal control by restricting State certification to

compliance with requirements issued or approved by EPA. Congress envisioned that the States' role would be fulfilled through the water quality standards adopted in harmony with and under Clean Water Act § 303 *(Matter of Power Auth. v Williams,* 60 NY2d, at 326-327, *supra)* and therefore, in this case, only in relation to 6 NYCRR parts 701 to 704.

We have considered all arguments advanced by the parties and conclude that an affirmance is warranted.

Accordingly, the order of the Appellate Division should be affirmed, with costs.

Chief Judge KAYE and Judges SIMONS, TITONE, SMITH and LEVINE concur; Judge HANCOCK, JR., taking no part.

Order affirmed, with costs.

APPENDIX C—Reported Opinion of Appellate Division, Third Department.

In the Matter of NIAGARA MOHAWK POWER CORPORATION, Respondent, v NEW YORK STATE DEPARTMENT OF ENVIRONMENTAL CONSERVATION et al., Appellants.

Third Department, January 7, 1993

SUMMARY

APPEAL from a judgment of the Supreme Court (Harold J. Hughes, Jr., J.), entered July 1, 1991 in Albany County, which, in a combined proceeding pursuant to CPLR article 78 and action for declaratory judgment, granted a petition to review a determination of respondent Department of Environmental Conservation that, *inter alia*, certain provisions of ECL article 15 are applicable to petitioner's hydroelectric project.

HEADNOTE

Environmental Conservation — Water Quality Certification — Hydroelectric Power Projects — Federal Preemption

Petitioner utility company, in conjunction with its application to the Federal Energy Regulatory Commission (FERC) for licenses enabling it to construct new hydroelectric facilities and perform dam repair or reconstruction work on existing ones, sought, pursuant to section 401 of the Federal Clean Water Act (33 USC § 1341), certification from the State that the resulting discharge into navigable waters meets certain Federal and State water quality requirements, and in petitioner's combined CPLR article 78 proceeding and declaratory judgment action, instituted in response to respondent Department of Environmental Conservation's (DEC) insistence that the projects must satisfy many different provisions of the ECL before it will issue the certification, Supreme Court properly determined that Federal preemption precluded DEC from requiring a project subject to section 401 certification to undergo the sweeping review sought by DEC. While the Federal Power Act (16 USC § 791a *et seq.*; FPA) establishes a comprehensive licensing and regulatory scheme which generally preempts the application of State law to such projects, the Clean Water Act contains a narrow exception to FERC's exclusive jurisdiction, insofar as it empowers States to certify whether a project complies with its water quality requirements and makes such State certification necessary before a license may be granted. DEC's authority encompasses the right to request information bearing on aspects of water quality, such as turbidity and temperature change, that are addressed in regulations promulgated by DEC in accordance with the Clean Water Act; however, other statutory and regulatory provisions, more indirectly related to water quality, may not be used as a basis for review under section 401, inasmuch as to do so would extend DEC's "veto power" over FERC-regulated projects well beyond that intended by Congress. The actual provisions of the ECL which DEC seeks to invoke address the very matters that have been reserved by the FPA for determination at the Federal level; environmental and conservation factors of concern to a State are to be weighed at the Federal level, and to allow them to serve as a predicate for a State "veto" of the project is indefensible for it would effectively undermine the intent of Congress.

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Am Jur 2d, Constitutional Law, § 74; Public Utilities, § 292.

16 USCS § 791a; 33 USCS § 1341.

NY Jur 2d, Constitutional Law, § 104; Environmental Rights and Remedies, § 143.

ANNOTATION REFERENCE

See ALR Index under Federal Power Act and Commission; Hydroelectric Power; Pre-emption.

APPEARANCES OF COUNSEL

Robert Abrams, Attorney-General, Albany *(Kathleen Liston Morrison, Peter H. Schiff, Val E. Washington* and *Maureen F. Leary* of counsel), for appellants.

Brian K. Billinson, Syracuse, and *Hiscock & Barclay,* Albany *(Timothy P. Sheehan* of counsel), for respondent.

OPINION OF THE COURT

Yesawich Jr., J.

Petitioner, a private, investor-owned utility company which owns and operates hydroelectric facilities throughout the State, recently applied to the Federal Energy Regulatory Commission (hereinafter FERC) for licenses enabling it to construct several new facilities and to perform dam repair or reconstruction work on existing ones, and anticipates filing similar additional applications in the near future. Section 401 of the Federal Clean Water Act (33 USC § 1341) provides that when such proposed construction or repair will result in any discharge into navigable waters, the applicant must obtain, from the State in which the discharge originates, a certification that the discharge meets certain Federal and State water quality requirements *(see,* 33 USC § 1341 [a]). In response to insistence by respondent Department of Environmental Conservation (hereinafter DEC) that the projects proposed by petitioner must satisfy many different provisions of the ECL (all of which ostensibly, directly or indirectly, affect water quality), including the regulatory requirements of the State Environmental Quality Review Act (ECL art 8; hereinafter SEQRA) before it will issue the requisite certification, peti-

tioner applied to DEC for a declaratory ruling that the Federal Power Act (hereinafter FPA; 16 USC § 791a *et seq.)* preempts DEC's authority to require compliance with these State laws. On August 27, 1990, DEC ruled that by enacting section 401 of the Clean Water Act, Congress intended the States to have authority to exact compliance with all State laws which bear on water quality before granting a certification, or to condition that certification upon such compliance.

Petitioner thereupon instituted this combined CPLR article 78 proceeding and declaratory judgment action, seeking annulment of DEC's declaratory ruling and a declaration that the section 401 certification process only allows DEC, with respect to State law, to consider the water quality standards set forth in 6 NYCRR parts 701-704. Respondents answered and moved to dismiss. Supreme Court determined that Federal preemption precluded DEC from requiring a project subject to section 401 certification to undergo the sweeping review sought by DEC. Respondents appeal.

There is no dispute that the FPA establishes a comprehensive scheme pursuant to which all hydroelectric projects are to be licensed and regulated by FERC, and that this legislation generally preempts the application of State law, including licensing and permitting requirements, to such projects *(see, First Iowa Coop. v Power Commn.,* 328 US 152, 167-168, 181; *Matter of deRham v Diamond,* 32 NY2d 34, 44). However, the Clean Water Act contains a narrow exception to FERC's exclusive jurisdiction, insofar as it empowers States to certify whether a project complies with its water quality requirements and makes such a State certification necessary before a license may be granted *(see,* 33 USC § 1341 [a]). At issue here is the breadth of a State's power engendered by this exception.

Recently, we held that DEC's authority in this area, which has been likened to a veto power, encompassed the right to request certain information from the applicant *(Matter of Long Lake Energy Corp. v New York State Dept. of Envtl. Conservation,* 164 AD2d 396, 401-403); significantly, the information sought bore on aspects of water quality, such as turbidity and temperature change, that were addressed in the regulations, found at 6 NYCRR parts 701-704,* which DEC promulgated in accordance with the Clean Water Act. In so

* The water quality standards set forth in 6 NYCRR parts 701-704 relate to taste, color, odor, turbidity, suspended and dissolved solids, pH, dissolved oxygen, coliform, thermal discharges, and other chemicals and substances.

doing, we explicitly recognized the "very limited nature of the activity left by 33 USC § 1341 [Clean Water Act § 401] to State action", and noted that " 'the standards adopted by [DEC] and Federally approved * * * relating to such things as *turbidity and temperature change*' " were the basis for DEC's request for information, including plans for the proposed facility (*supra*, at 402-403 [emphasis in original]). We are now asked by respondents to declare that other statutory and regulatory provisions, more indirectly related to water quality, may be used as a basis for review under section 401. Because we believe that to do so would extend DEC's "veto power" over FERC-regulated projects well beyond that intended by Congress, we affirm the judgment of Supreme Court.

Respondents have attempted to justify DEC's consideration of various sections of the ECL, including ECL 15-0501 (disturbance of stream beds), 15-0503 (dam construction), 15-0507 (dam safety), 15-0801 *et seq.* (reservoir releases), 15-2701 *et seq.* (wild, scenic, and recreational rivers), article 24 (freshwater wetlands), article 11 (fish and wildlife), and article 8 (environmental quality review), as part of the certification process on the ground that the language of section 401 (d) of the Clean Water Act (33 USC § 1341 [d]) allows State certification to be conditioned on compliance with "any other appropriate requirement of State law"; but this merely begs the question as to which laws are "appropriate". Respondents argue that any provision protective of water quality, in any manner, may be applied. To support their contention, respondents submit a letter from the Federal Environmental Protection Agency (hereinafter EPA), the agency charged with administering the Clean Water Act, to FERC wherein the EPA observes that "water quality involves far more than just addressing water chemistry". However, the EPA acknowledges that State water quality standards, adopted in accordance with the guidelines of section 303 of the Clean Water Act (33 USC § 1313) (i.e., use designations and quality standards to preserve the designated uses), "form the backbone" of the certification process set forth in section 401 of the Clean Water Act (33 USC § 1341), and goes on to note that these water quality standards are not limited to "chemical-specific criteria", but rather that States are encouraged to adopt both narrative and numerical criteria, and will shortly be required to include biological criteria. Thus, even the EPA recognizes that the proper mechanism by which a State may apply water quality provisions to a project licensed under the FPA is by adopting standards under sec-

tion 303, which, if Federally approved, may then be enforced as part of the certification procedure *(see also, Matter of Power Auth. v Williams,* 60 NY2d 315, 327, n 3).

When the actual provisions of the ECL which DEC seeks to invoke are examined, it is clear that they address the very matters that have been reserved by the FPA for determination at the Federal level—dam safety, general balancing of economic and other concerns, the effect on wildlife, recreational opportunities and the like. The 1986 amendments to the FPA, which require FERC to consider fish and wildlife habitats, recreational opportunities and environmental quality in general as part of the licensing process, indicate that Congress intended such matters to remain within the Federal domain, as factors to be balanced against other concerns, such as the power and development purposes of the proposed facility for which a license is sought *(see,* 16 USC § 797 [e]). It is also noteworthy that Congress has provided that FERC must consider any comprehensive plan prepared by a State, and must solicit and entertain recommendations of State agencies regarding flood control, recreation, navigation, and fish or wildlife concerns *(see,* 16 USC § 803); indeed, a consultation procedure exists which insures that States will have an opportunity to have input in this regard *(see,* 18 CFR 4.38). This is a further indication that environmental and conservation factors of concern to a State are to be weighed at the Federal level; to allow them to serve as a predicate for a State "veto" of the project is indefensible for it would effectively undermine the intent of Congress *(see, Calvert Cliffs' Coordinating Comm. v United States Atomic Energy Commn.,* 449 F2d 1109, 1123).

WEISS, P. J., MERCURE, CREW III and CASEY, JJ., concur.

Ordered that the judgment is affirmed, without costs.

APPENDIX D—Original Opinion and Order of Appellate Division, Third Department.

SUPREME COURT—APPELLATE DIVISION

THIRD JUDICIAL DEPARTMENT

Decided and Entered: January 7, 1993

IN THE MATTER OF NIAGARA MOHAWK POWER CORPORATION,

Respondent,

v

NEW YORK STATE DEPARTMENT OF ENVIRONMENTAL CONSERVATION *et al.*,

Appellants.

65306

OPINION AND ORDER

Calendar Date: November 19, 1992

Before: Weiss, P.J., Yesawich Jr., Mercure, Crew III and Casey, J.J.

Robert Abrams, Attorney-General (Kathleen Liston Morrison of counsel), Albany, for appellants.

Brian K. Billinson, Syracuse, for respondent.

Yesawich Jr., J.

Appeal from a judgment of the Supreme Court (Hughes, J.), entered July 1, 1991 in Albany County, which granted

petitioner's application, in a combined proceeding pursuant to CPLR article 78 and action for declaratory judgment, to review a determination of respondent Department of Environmental Conservation that, *inter alia*, certain provisions of ECL article 15 are applicable to petitioner's hydroelectric project.

Petitioner, a private, investor-owned utility company which owns and operates hydroelectric facilities throughout the State, recently applied to the Federal Energy Regulatory Commission (hereinafter FERC) for licenses enabling it to construct several new facilities and to perform dam repair or reconstruction work on existing ones, and anticipates filing similar additional applications in the near future. Section 401 of the Federal Clean Water Act (33 USC § 1341) provides that when such proposed construction or repair will result in any discharge into navigable waters, the applicant must obtain, from the state in which the discharge originates, a certification that the discharge meets certain Federal and State water quality requirements *(see*, 33 USC § 1341 [a]). In response to insistence by respondent Department of Environmental Conservation (hereinafter DEC) that the projects proposed by petitioner must satisfy many different provisions of the ECL (all of which ostensibly, directly or indirectly, affect water quality), including the regulatory requirements of the State Environmental Quality Review Act (ECL art 8) (hereinafter SEQRA) before it will issue the requisite certification, petitioner applied to DEC for a declaratory ruling that the Federal Power Act (hereinafter FPA) (16 USC § 791a *et seq*.) preempts DEC's authority to require compliance with these State laws. On August 27, 1990, DEC ruled that by enacting section 401 of the Clean Water Act, Congress intended the states to have authority to exact compliance with all state laws which bear on water

quality before granting a certification, or to condition that certification upon such compliance.

Petitioner thereupon instituted this combined CPLR article 78 proceeding and declaratory judgment action, seeking annulment of DEC's declaratory ruling and a declaration that the section 401 certification process only allows DEC, with respect to State law, to consider the water quality standards set forth in 6 NYCRR parts 701-704. Respondents answered and moved to dismiss. Supreme Court determined that Federal preemption precluded DEC from requiring a project subject to section 401 certification to undergo the sweeping review sought by DEC. Respondents appeal.

There is no dispute that the FPA establishes a comprehensive scheme pursuant to which all hydroelectric projects are to be licensed and regulated by FERC, and that this legislation generally preempts the application of state law, including licensing and permitting requirements, to such projects *(see, First Iowa Hydro-Elec. Coop. v Federal Power Commn.*, 328 US 152, 167-168, 181, *Matter of de Rham v Diamond*, 32 NY2d 34, 44). However, the Clean Water Act contains a narrow exception to FERC's exclusive jurisdiction, insofar as it empowers states to certify whether a project complies with its water quality requirements and makes such a state certification necessary before a license may be granted *(see*, 33 USC § 1341 [a]). At issue here is the breadth of a state's power engendered by this exception.

Recently, we held that DEC's authority in this area, which has been likened to a veto power, encompassed the right to request certain information from the applicant *(Matter of Long Lake Energy Corp. v New York State Dept. of Envtl. Conservation*, 164 AD2d 396, 401-403); significantly, the information sought bore on aspects of water quality, such as turbidity and temperature change, that were addressed in the

regulations, found at 6 NYCRR parts 701-704[1], which DEC promulgated in accordance with the Clean Water Act. In so doing, we explicitly recognized the "very limited nature of the activity left by 33 USC § 1341 [Clean Water Act § 401] to State action", and noted that "the standards adopted by [DEC] and Federally approved *** relating to such things as *turbidity and temperature change*" were the basis for DEC's request for information, including plans for the proposed facility (*id.*, at 402-403 [emphasis in original]). We are now asked by respondents to declare that other statutory and regulatory provisions, more indirectly related to water quality, may be used as a basis for review under section 401. Because we believe that to do so would extend DEC's "veto power" over FERC-regulated projects well beyond that intended by Congress, we affirm the judgment of Supreme Court.

Respondents have attempted to justify DEC's consideration of various sections of the ECL, including ECL § 15-0501 (disturbance of stream beds), ECL 15-0503 (dam construction), ECL 15-0507 (dam safety), ECL 15-0801 *et seq.* (reservoir releases), ECL 15-2701 *et seq.* (wild, scenic, and recreational rivers), ECL article 24 (freshwater wetlands), ECL article 11 (fish and wildlife), and ECL article 8 (environmental quality review), as part of the certification process on the ground that the language of section 401 (d) of the Clean Water Act (33 USC § 1341 [d]) allows state certification to be conditioned on compliance with "any other appropriate requirement of State law"; but this merely begs the question as to which laws are "appropriate". Respondents argue that any provision protective of water qual-

[1]The water quality standards set forth in 6 NYCRR parts 701-704 relate to taste, color, odor, turbidity, suspended and dissolved solids, pH, dissolved oxygen, coliform, thermal discharges, and other chemicals and substances.

ity, in any manner, may be applied. To support their contention, respondents submit a letter from the Federal Environmental Protection Agency (hereinafter EPA), the agency charged with administering the Clean Water Act, to FERC wherein the EPA observes that "water quality involves far more than just addressing water chemistry". However, the EPA acknowledges that state water quality standards, adopted in accordance with the guidelines of section 303 of the Clean Water Act (33 USC § 1313) (i.e., use designations and quality standards to preserve the designated uses), "form the backbone" of the certification process set forth in section 401 of the Clean Water Act (33 USC § 1341), and goes on to note that these water quality standards are not limited to "chemical-specific criteria", but rather that states are encouraged to adopt both narrative and numerical criteria, and will shortly be required to include biological criteria. Thus, even the EPA recognizes that the proper mechanism by which a state may apply water quality provisions to a project licensed under the FPA is by adopting standards under section 303, which, if Federally approved, may then be enforced as part of the certification procedure *(see also, Matter of Power Auth. of State of N.Y. v Williams*, 60 NY2d 315, 327 n 3).

When the actual provisions of the ECL which DEC seeks to invoke are examined, it is clear that they address the very matters that have been reserved by the FPA for determination at the Federal level—dam safety, general balancing of economic and other concerns, the effect on wildlife, recreational opportunities and the like. The 1986 amendments to the FPA, which require FERC to consider fish and wildlife habitats, recreational opportunities and environmental quality in general as part of the licensing process, indicate that Congress intended such matters to remain within the Federal domain, as factors to be balanced against other concerns,

such as the power and development purposes of the proposed facility for which a license is sought *(see,* 16 USC § 797 [e]). It is also noteworthy that Congress has provided that FERC must consider any comprehensive plan prepared by a state, and must solicit and entertain recommendations of state agencies regarding flood control, recreation, navigation, and fish or wildlife concerns *(see,* 16 USC § 803); indeed, a consultation procedure exists which insures that states will have an opportunity to have input in this regard *(see,* 18 CFR 4.38). This is a further indication that environmental and conservation factors of concern to a state are to be weighed at the Federal level; to allow them to serve as a predicate for a state "veto" of the project is indefensible for it would effectively undermine the intent of Congress *(see, Calvert Cliffs' Coordinating Comm. v United States Atomic Energy Commn.,* 449 F2d 1109, 1123).

Weiss, P.J., Mercure, Crew III and Casey, JJ., concur.

ORDERED that the judgment is affirmed, without costs.

ENTER:

/S/MICHAEL J. NOVACK
MICHAEL J. NOVACK
Clerk

APPENDIX E—Memorandum Decision of New York Supreme Court, Albany County.

SUPREME COURT OF THE STATE OF NEW YORK

COUNTY OF ALBANY

In the Matter of the Application of

NIAGARA MOHAWK POWER CORPORATION,

Petitioner,

against

NEW YORK STATE DEPARTMENT OF ENVIRONMENTAL CONSERVATION, COMMISSIONER THOMAS G. JORLING and DEPUTY COMMISSIONER AND GENERAL COUNSEL MARC S. GERSTMAN,

Respondents.

(Supreme Court, Albany County, Special Term,
February 15, 1991)
(RJI No. 0191-ST2860)
(JUSTICE HAROLD J. HUGHES, Presiding)

Appearances:

Brian K. Billinson, Esq., Attorney for Petitioner, 300 Erie Boulevard West, Syracuse, New York 13202.

Hon. Robert Abrams, Attorney General of New York State, Attorney for Respondents, (Maureen F. Leary, Esq., of Counsel), NYS Department of Law, The Capitol, Albany, New York 12224

HUGHES, J.:

Petitioner seeks "a judgment pursuant to CPLR Article 78 determining that the Respondents' decision dated August 27, 1990 in response to a request for a certain declaratory ruling is erroneous as a matter of law, arbitrary and capricious; that the Federal Power Act preempts the New York State Department of Environmental Conservation ("DEC") from applying the substantive provisions of Environmental Conservation Law §§15-0501, 15-0503, 15-0505, 15-0507, 15-0801 *et seq.*, 15-2701 *et seq.* and Articles 8, 11 and 24 to hydroelectric projects such as those undertaken and planned by Niagara, that the Section 401 Certification process only allows the DEC, with respect to State Law, to consider the water quality standards set forth in 6 NYCRR §§701.19 and 704.2". The respondents have served both a motion to dismiss the petition upon objections in point of law, as well as an answer containing objections in point of law and a return.

The petition asserts that as part of its operation as a public electric and gas utility Niagara Mohawk owns and operates 73 hydroelectric generating facilities on navigable waters in New York State. It is alleged that under to the Federal Power Act (FPA) the Federal Energy Regulation Commission (FERC) has exclusive jurisdiction to issue licenses for the construction and operation of hydroelectric generating plants located on navigable waters. It is alleged that pursuant to section 401 of the Clean Water Act (CWA), 33 USC §1341, FERC will not issue a license or permit until the state involved has certified that the project will not contravene that state's water quality standards. In New York State the Department of Environmental Conservation (DEC) is the State agency which issues the section 401 approval. It is alleged that DEC has been subjecting Niagara Mohawk's

section 401 certification applications to review under article 15 of the Environmental Conservation Law in violation of the FPA which preempts the field.

To eliminate that double review, Niagara Mohawk applied to DEC pursuant to section 204 of the State Administrative Procedure Act for a declaratory ruling that Article 15, Title 5, of the Environmental Conservation Law is not applicable upon a request for section 401 certification as the FPA preempts the field except for the issue of whether the project will affect the State's water quality standards. DEC issued a declaratory ruling on August 27, 1990, stating that the question of federal preemption cannot properly be resolved by the use of a declaratory ruling, and further stating that in its opinion applications for 401 certification were subject to review under the following State laws:

> "(a) Protection of Water: disturbance of stream beds [ECL §15-0501];
> (b) Protection of Waters: dam construction [ECL §15-0503];
> (c) Protection of Waters: excavation or fill (ECL 15-0505];
> (d) Dam Safety [ECL §15-0507];
> (e) Reservoir Releases [ECL §15-0801 *et seq.*];
> (f) Wild, Scenic and Recreational River System [ECL 15-2700, *et seq.*];
> (g) Freshwater Wetlands [ECL Article 24];
> (h) Fish and Wildlife [ECL Article 11]; and
> (i) Environmental Quality Review [ECL Article 8]".

This article 78 proceeding ensued. The Court will address the objections in point of law first. Although it is difficult to determine what objections in point of law are being raised

by the notice of motion dated February 7, 1991, one of them appears to be that:

> "A declaratory ruling in response to Niagara's petition would have forced NYSDEC to interpret the FPA and its relationship to the CWA and State law. I determined that issuing a declaratory ruling that interpreted federal laws and regulations was clearly outside the scope of the Department's authority granted to 6 NYCRR § 619.2 and was therefore an inappropriate means of resolving the issues raised in Niagara's declaratory ruling petition" (paragraph 6 of the affidavit of Mark S. Gerstman sworn to February 8, 1991)".

It is obvious that Deputy Commissioner Gerstman felt that the Department's authority to issue declaratory rulings was established by 6 NYCRR 619.2, and that this section precluded interpreting federal statutes. The Deputy Commissioner is in error. The Legislature, although not dealing with the issue of preemption, expressly determined in enacting subdivision (2) of section 206 of the State Administrative Procedure Act that:

> "Any person subject to a requirement imposed by a state statute or rule and to a similar requirement imposed by the federal government, may pursuant to section two hundred four of this chapter, petition the agency administering the state requirement for a declaratory ruling as to whether compliance with the federal requirement will be accepted as compliance with the state requirement. Upon receipt of such petition, the agency shall submit a copy thereof to

the office of business permits and regulatory assistance".

This provision establishes that the Legislature intended that federal statutes and rules can be interpreted by a state agency in issuing an administrative ruling. To the extent that 6 NYCRR 619.3 conflicts with the legislative will, it must yield. Although section 206 of the State Administrative Procedure Act does not expressly deal with a preemption question, its signals a legislative intent that a New York resident subjected to similar federal and state laws can obtain a declaratory ruling from the agency implementing the state laws as to whether he has to comply with the state or federal requirements. There appears to be no good reason to exempt preemption from the declaratory ruling process (see *Matter of Power Auth. of State of N.Y. v New York State Dept. of Environmental Conservation,* 58 NY2d 427, 433, 434). A declaratory ruling by DEC upon a preemption issue is subject to article 78 review (*Matter of Northeast Mines, Inc. v State of New York Dept. of Envtl. Conservation,* 113 AD2d 62).

The next objection in point of law is that the petition is barred by the four-month statute of limitations set forth in CPLR section 217. That argument lacks merit, as this proceeding was brought within four months after the issuance of the declaratory ruling. The Court has considered the remaining objections in point of law and find that they lack merit.

Turning to the merits, the Court of Appeals has held that the "section 401 certification process is accomplished by a determination that a proposed project will meet the particular water quality standards for the applicable classification" (*Matter of Power Auth. v Flacke*, 60 NY2d 315, 326, 327). In *Fourth Branch Assocs. v Department of Envtl. Conservation*, 146 Misc2d 334, Mr. Justice Harris held that the review powers of DEC under a section 401 certification request did not include subjecting the project to SEQRA review. In the unreported decision of *Fourth Branch Assocs. v Department of Envtl. Conservation*, Supreme Court, Albany County Special Term, J. Harris, November 28, 1989, Judge Harris held that federal preemption precluded subjecting a 401 certification application to article 15 review. This Court agrees with both holdings (see *Matter of Long Lake Energy Corp. v New York State Department of Environmental Conservation*, ____ AD2d ____, Third Department, decided December 6, 1990). To the extent necessary, this proceeding will be converted to a declaratory judgment action.

The petitioner will be awarded a judgment for the relief requested in the notice of petition. Petitioner is directed to submit a proposed judgment on notice.

Dated: April 1, 1991

APPENDIX F—Order of New York Supreme Court, Albany County

At a Special Term of the Supreme Court of the State of New York, held in and for the County of Albany, at the Albany County Courthouse, Albany, New York, on the 15th day of February, 1991.

PRESENT:
HON. HAROLD J. HUGHES

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF ALBANY

In the Matter of the Application of

NIAGARA MOHAWK POWER CORPORATION,

Petitioner,

- against -

THE NEW YORK STATE DEPARTMENT OF ENVIRONMENTAL CONSERVATION, THOMAS C. JORLING, COMMISSIONER, and MARC S. GERSTMAN, DEPUTY COMMISSIONER AND GENERAL COUNSEL,

Respondents.

Index No. 7218-90
RJI No. 0191-ST2860

Upon reading and filing of the notice of petition, dated December 21, 1990, the verified petition, dated December

19, 1990, and the memorandum of law submitted therewith by petitioner Niagara Mohawk Power Corporation; and

The notice of motion to dismiss the petition on objections in point of law, dated February 7, 1991, the affidavit of Marc S. Gerstman, sworn to on February 8, 1991, the verified answer and certified return, dated February 8, 1991, and the memorandum of law submitted therewith by respondents, New York State Department of Environmental Conservation, Commissioner Thomas C. Jorling, and Deputy Commissioner and General Counsel Marc S. Gerstman; and

The affidavit of Brian K. Billinson in opposition to respondent's motion to dismiss, sworn to on February 13, 1991; and

The matter having been heard at a Term of this Court before the Honorable Harold J. Hughes on the 15th day of February, 1991, and the petitioner having appeared by its attorney, Brian K. Billinson, Esq., of counsel, and the respondents having appeared by their attorney, Maureen F. Leary, Esq., Assistant Attorney General, of counsel, and the Court having heard the arguments of counsel; and

Upon due deliberation and in accordance with the Court's April 1, 1991 decision, a copy of which is annexed hereto and incorporated herein, it is hereby

ORDERED, that Respondents' motion to dismiss the petition on objections in point of law is hereby denied; and it is further

ORDERED, that this proceeding is hereby converted to a declaratory judgment action pursuant to CPLR § 103; and it is further

ORDERED, that judgment as requested in the Petition is hereby awarded to Petitioners annulling Respondents' August 27, 1990 ruling; preempting Respondents from applying the substantive provisions of ECL §§ 15-0501,

15-0503, 15-0505, 15-0507, 15-0801, *et seq.*, 15-2701, *et seq.*, and Articles 8, 11 and 24 of the Environmental Conservation Law to hydroelectric projects by Petitioner and licensed by the Federal Energy Regulatory Commission under the Federal Power Act; and limiting Respondents to considering only the water quality standards set forth in 6 NYCRR § 701.19 and 704.2 during Respondents' Clean Water Act § 401 of hydroelectric projects undertaken by Petitioner and licensed by the Federal Energy Regulatory Commission under the Federal Power Act.

Signed this 19th day of June, 1991.

ENTER:
/s/HAROLD J. HUGHES
HON. HAROLD J. HUGHES
Justice of the Supreme Court

APPENDIX G—Environmental Conservation Law §§ 15-0501, 15-0503, 15-0505 and 15-0507.

TITLE 5—PROTECTION OF WATER

§ 15-0501. Protection of certain streams; disturbances of stream beds; permit

1. Except as provided in subdivisions 4, 5, 6 and 7 of this section, no person or public corporation shall change, modify or disturb the course, channel or bed of any stream as defined in subdivision 2, or remove any sand, gravel or other material from the bed or banks of such a stream without a permit issued pursuant to subdivision 3 of this section.

2. For the purposes of this section, stream shall mean that portion of any fresh surface watercourse, except lakes or ponds having a surface area greater than ten acres at mean low water level, for which the department has adopted or may hereafter adopt pursuant to section 17-0301, any of the following classifications or standards:

AA and AA(T),

A and A(T),

B and B(T),

C(T).

Small ponds or lakes with a surface area at mean low water level of ten acres or less, located in the course of a stream, shall be considered a part of the stream and subject to regulation under this section.

3. Permit.

a. Before granting a permit, a permit renewal or a permit modification pursuant to this section, the department shall ascertain the probable effect on the health, safety and welfare of the people of the state, and the effect on the natural resources of the state, including soil, forests, water, fish and aquatic resources therein, likely to result from the proposed project or work.

b. In order to minimize the disturbance of a stream and in order to prevent unreasonable erosion of soil, increased turbidity of the waters, irregular variations in velocity, temperature and level of waters, the loss of fish and aquatic wildlife and the destruction of natural habitat thereof, and the danger of flood or pollution, the department shall review the permit application or request for renewal or modification of an existing permit and may approve the manner and the extent to which the stream bed or channel may be changed, altered or modified and may limit the quantity of sand, gravel or other material to be removed, designate the location in the bed, channel or banks of the stream from which the sand, gravel or other material may be removed, or it may deny the permit or request.

c. The rules and regulations adopted by the department to implement this section and the provisions of article 70 of this chapter and rules and regulations adopted thereunder shall govern the processing of permit applications, renewals, modifications, suspensions and revocations under this section.

4. No permit under this section shall be required of any local public corporation which has entered into a written memorandum of understanding with the department establishing the plan of operation to be followed in carrying out projects or work affecting water courses so as to afford proper protection to the public beneficial uses of such water courses.

5. No permit under this section shall be required of any state department or state public corporation. State departments and state public corporations may enter into a written memorandum of understanding with the department concerning projects or work of the type for which a permit would be required under this section if the project or work were undertaken by a person or local public corporation. The memorandum may establish procedures for review by the department of the plans for such projects or work and for written recommendations by the department with respect thereto.

6. No permit under this section shall be required for emergency work in a stream or on its banks which is immediately necessary to protect the health, safety and well-being of any person or persons or to prevent damage to personal or real property, provided that the department is given written notification by registered mail or telegraph within forty-eight hours after the commencement of the work and within forty-eight hours following the completion of such work. Whenever emergency work is performed as provided in this subdivision, it shall be performed in a manner that will cause the least change, modification, disturbance or damage to the course or bed of the stream and its banks.

7. No permit under this section shall be required for certain agricultural activities of persons and corporations actively cultivating land devoted to agriculture whether or not the same be along a stream or watercourse as described in subdivision 2; providing that these agricultural activities consist only of crossing and recrossing of such streams or watercourses by livestock or by wheeled farm equipment normally used for traditional agricultural purposes; or the use of such stream or watercourse for withdrawal of water for irrigation where such withdrawal does not require altering the bed, banks or course of the stream in any manner.

8. The requirements of this section shall be in addition to those specified in section 15-0505 of this title, provided however, that the department may, by rule and regulation, provide that only one application for a permit or request for renewal or modification of an existing permit need be filed with the proposed project or work requires a department permit under this section and section 15-0505 of this title.

(L.1972, c. 664, § 2; amended L.1973, c. 489, § 1; L.1976, c. 301, § 1; L.1979, c. 233, § 1.)

§ 15-0503. Protection of water bodies; permit

1. Except as provided in subdivision 4 of this section

a. No dam or impoundment structure, including any artificial obstruction, temporary or permanent, in or across a natural stream or water course, shall be erected, constructed, reconstructed or repaired by any person or local public corporation without a permit issued pursuant to subdivision 3 of this section.

b. Except where a lease or other appropriate conveyance of an interest authorizing the use and occupancy of state-owned lands underwater has been obtained from the commissioner of general services pursuant to subdivision seven of section seventy-five of the public lands law, no dock, wharf, platform, breakwater, mooring, or other structure in, on or above waters shall be erected, placed, constructed, reconstructed, or expanded after the effective date of this paragraph by any person or local public corporation without a permit issued pursuant to subdivision 3 of this section. The term "reconstructed" as used in this section shall mean the substantial rebuilding of structures or facilities and shall not apply to ordinary maintenance or repair of existing functional structures or facilities, such as repainting, redriving pilings or replacing broken boards in docks.

c. A city, town, village or county may submit to the commissioner a local law or ordinance regulating docks or other structures as described in paragraph b of this subdivision. The commissioner shall review such law or ordinance to determine whether it provides environmental protection comparable to, or greater than, the provisions of such paragraph and any regulations promulgated thereunder. If the commissioner determines that the local law or ordinance submitted meets such requirements, the commissioner may delegate, upon such terms and conditions as he or she deems appropriate, to the local government the authority to administer the permit program and to charge a fee for permit processing. Any delegation may be revoked by the commissioner if he or she finds that the local government has failed to carry out the program in accordance with the terms of the delegation.

2. For the purposes of this section, a dam or impoundment structure shall include, but shall not be limited to, earth fiils, with or without controllable outlet gates, and roads, bridges or fords which unduly impede the flow of water.

3. Permits. a. Before granting a permit, a permit renewal or a permit modification pursuant to this section, the department shall ascertain the probable effect on the health, safety and welfare of the people of the state, and the effect on the natural resources of the state likely to result from the proposed project or work.

b. The department shall review the permit application or request for renewal or modification of an existing permit and may approve the manner and extent to which the waters of the state or the banks and shore thereof will be affected by the proposed project or work and may grant or deny the permit or request, or may grant the permit or request with such conditions as might appear necessary to safeguard life, property and natural resources during and after the execution of the proposed project or work.

c. The rules and regulations adopted by the commissioner to implement this section and the provisions of article 70 of this chapter and rules and regulations adopted thereunder shall govern permit applications, renewals, modifications, suspensions and revocations under this section.

d. The requirements of this section shall be in addition to those specified in sections 15-0501 and 15-0505 of this title, provided however, that the department may, by rule and regulation, provide that only one application for a permit or request for renewal or modification of an existing permit need be filed when the proposed project or work requires a department permit under this section and any other section of this title.

4. The requirement of a permit pursuant to this section shall not apply to the following facilities:

a. A structure used for impounding water where the area draining into the pond or other body of impounded water formed thereby does not exceed one square mile, unless (1) the impounding structure is more than ten feet in height above the bed of the stream at any point or (2) unless the quantity of water which the structure impounds exceeds one million gallons; or

b. A farm pond erected upon lands devoted to farming for the purpose of soil conservation, propagation of fish, irrigation, watering of livestock, maintenance of wildlife or general farm use which is formed by an earth embankment with an all-earth vegetated spillway and other accessory structures, unless (1) the height of earth embankment, measured from the top thereof to the lowest point of the excavation in the reservoir area, exceeds fifteen feet; or (2) the capacity of the farm pond exceeds one million five hundred thousand gallons measured as the total volume of water which would be impounded if the surface of the water were at the bottom of the spillway at its highest point; or (3) the area draining into the farm pond exceeds two hundred acres;

or (4) the pond comprises more than ten acres of surface water when full; or (5) the water to said farm pond is diverted into said pond by an artificial obstruction in or across a natural stream or water course.

c. A dock, pier, wharf or other structure used solely as a landing place on water providing dockage for five or fewer boats and encompassing within its outer perimeter an area less than four thousand square feet;

d. A mooring facility providing mooring for fewer than ten boats;

e. Seasonal replacement or reinstallation of structures installed prior to the effective date of this paragraph.

5. The design, preparation of plans, estimates and specifications and the supervision of the erection, construction, reconstruction and repair of all the structures hereinbefore referred to shall be done by a licensed professional engineer, or in the case of farm ponds for which a permit is required, by an engineer or conservationist employed by a governmental agency cooperating with a soil conservation district, or by an engineer employed by the department.

6. Notwithstanding the provisions of this or any other chapter or law to the contrary, no reservoirs for any purpose shall hereafter be constructed on the Upper Hudson River in the Adirondack park between Luzerne and the river's source; the Boreas river from its mouth to Durgin Brook; the Indian river from its mouth to Abanakee Dam; and the Cedar river from its mouth to Cedar River Flow, by the state or by any river regulating board.

(L.1972, c. 664, § 2; amended L.1975, c. 184, §§ 1, 2; L.1979, c. 233, § 2; L.1983, c. 442, § 1, As amended L.1992, c. 791, §§ 5, 6.)

§ 15-0505. Protection of navigable waters; excavation or fill; permit

1. No person, local public corporation or interstate authority shall excavate or place fill below the mean high water level in any of the navigable waters of the state, or in marshes, estuaries, tidal marshes and wetlands that are adjacent to and contiguous at any point to any of the navigable waters of the state and that are inundated at mean high water level or tide, without a permit issued pursuant to subdivision 3 of this section. For the purposes of this section, fill shall include, but shall not be limited to, earth, clay, silt, sand, gravel, stone, rock, shale, concrete (whole or fragmentary), ashes, cinders, slag, metal, or any other similar material whether or not enclosed or contained by (1) crib work of wood, timber, logs, concrete or metal, (2) bulkheads and cofferdams of timber sheeting, bracing and piling or steel sheet piling or steel H piling, separated or in combination. Nothing contained in this section is intended to be, nor shall be construed to limit, impair or affect the memorandum of understanding which any state department enters into with the Department of Environmental Conservation or the general powers and duties of the Department of Transportation relating to canals or the general powers and duties of the Department of Environmental Conservation relating to flood control.

2. A permit application or request for a permit renewal or modification shall be made on forms provided by the department and shall consist of a description of the character and extent of the proposed project or work, drawings, plans and specifications providing the location and details of the proposed project or work, and such additional information as the department may require.

3. Before granting a permit, a permit renewal or a permit modification pursuant to this section the department shall ascertain the probable effect on the use of such waters for navigation,

the health, safety and welfare of the people of the state and the effect on the natural resources of the state, including soil, forests, water, fish and aquatic resources therein, likely to result from the proposed project or work.

4. The department shall review the permit application or request for renewal or modification of an existing permit and may grant or deny the permit or request, or may grant the permit with such conditions as will safeguard life or property against danger or destruction and as will make the navigable waters safe for use by the public.

5. The rules and regulations adopted by the department to implement this section and the provisions of article 70 of this chapter and rules and regulations adopted thereunder shall govern the processing of permit applications, renewals, modifications, suspensions and revocations under this section.

6. The provisions of subdivisions 1, 2, 3 and 4 of this section shall not apply to emergency work in waters described in subdivision 1 of this section which is immediately necessary to protect the health, safety and well-being of any person or persons or to prevent damage to personal or real property, provided that the department is given written notification by registered mail or telegraph within forty-eight hours after the commencement of the work and within forty-eight hours following the completion of the work. Whenever such emergency work is performed as provided in this subdivision, it shall be performed in a manner that will cause the lease change, modification, disturbance or damage to the environment.

7. The requirements of this section shall be in addition to those specified in section 15-0501 of this title, provided however, that the department may, by rule and regulation, provide that only one application for a permit or request for renewal or modification of an existing permit need be filed when the proposed project or

work requires a department permit under this section and section 15-0501 of this title.

(L.1972, c. 664, § 2; amended L.1975, c. 271, § 1; L.1975, c. 349, § 1; L.1979, c. 233, § 3.)

§ 15-0507. Structures impounding waters; inspection

1. Whenever in the judgment of the department public safety requires, the department shall investigate dams and other structures impounding waters in the state, and docks, piers and wharfs extending into such waters.

2. The department shall have the power, after hearing on due notice, to make and serve an order, setting forth the findings of fact and conclusions therefrom, directing any person or local public corporation, erecting, reconstructing, repairing, maintaining or using any such structures to either remove the said structure or to erect, reconstruct or repair the same within such reasonable time and in such manner as shall be specified in said order, and it shall be the duty of every such person or local public corporation to obey, observe and comply with such order and with the conditions therein prescribed. The provisions of title 9 of this article with respect to administrative procedures shall be applicable to hearings under this section.

3. It shall be unlawful for any person or local public corporation to fail, omit or neglect to comply with such order or to fail to remove, erect, reconstruct or repair the same as provided in the order within a reasonable time as designated by the department.

4. Upon the violation of any such order, the department shall have power to enter upon the lands and waters where such structures are located for the purpose of removing, repairing or reconstructing the same and to take such other and further precautions which it may deem necessary to safeguard life or prop-

erty or protect the natural resources of the state against danger occasioned by the presence of such structures. In removing, repairing and reconstructing such structures or other properties so affected the department shall not deviate from the method, manner and specifications contained in the original order.

5. The department shall certify the amount of the costs and expenses incurred by the department and any state departments for the removal, repair or reconstruction aforesaid in anywise connected therewith to the county legislative body of the county or counties in which the said lands and waters are located, whereupon it shall be the duty of such county legislative body of each county to add the amount so certified to the assessment rolls of such locality or localities as a charge against the real property upon which the dam, dock or other structure is located, designated or described by the department as chargeable therewith, and to issue its warrant or warrants for the collection thereof. Thereupon it shall become the duty of such locality or localities through their proper officers to collect the amount so certified in the same manner as other taxes are collected in such locality or localities and when collected to pay the same to the department, who shall thereupon, pay the same into the State Treasury. Any amount so levied shall thereupon become and be a lien upon the real property affected thereby to the same extent as any tax levy becomes and is a lien thereon.

(L.1972, c. 664, § 2.)

Section 401 of the Clean Water Act, 33 U.S.C. 1341, provides:

§ 1341. Certification

(a) Compliance with applicable requirements; application; procedures; license suspension

(1) Any applicant for a Federal license or permit to conduct any activity including, but not limited to, the construction or operation of facilities, which may result in any discharge into the navigable waters, shall provide the licensing or permitting agency a certification from the State in which the discharge originates or will originate, or, if appropriate, from the interstate water pollution control agency having jurisdiction over the navigable waters at the point where the discharge originates or will originate, that any such discharge will comply with the applicable provisions of sections 1311, 1312, 1313, 1316, and 1317 of this title. In the case of any such activity for which there is not an applicable effluent limitation or other limitation under sections 1311(b) and 1312 of this title, and there is not an applicable standard under sections 1316 and 1317 of this title, the State shall so certify, except that any such certification shall not be deemed to satisfy section 1371(c) of this title. Such State or interstate agency shall establish procedures for public notice in the case of all applications for certification by it and, to the extent it deems appropriate, procedures for public hearings in connection with specific applications. In any case where a State or interstate agency has no authority to give such a certification, such certification shall be from the Administrator. If the State, interstate agency, or Administrator, as

the case may be, fails or refuses to act on a request for certification, within a reasonable period of time (which shall not exceed one year) after receipt of such request, the certification requirements of this subsection shall be waived with respect to such Federal application. No license or permit shall be granted until the certification required by this section has been obtained or has been waived as provided in the preceding sentence. No license or permit shall be granted if certification has been denied by the State, interstate agency, or the Administrator, as the case may be.

(2) Upon receipt of such application and certification the licensing or permitting agency shall immediately notify the Administrator of such application and certification. Whenever such a discharge may affect, as determined by the Administrator, the quality of the waters of any other State, the Administrator within thirty days of the date of notice of application for such Federal license or permit shall so notify such other State, the licensing or permitting agency, and the applicant. If, within sixty days after receipt of such notification, such other State determines that such discharge will affect the quality of its waters so as to violate any water quality requirements in such State, and within such sixty-day period notifies the Administrator and the licensing or permitting agency in writing of its objection to the issuance of such license or permit and requests a public hearing on such objection, the licensing or permitting agency shall hold such a hearing. The Administrator shall at such hearing submit his evaluation and recommendations with respect to any such objection to the licensing or permitting agency. Such agency, based upon the

recommendations of such State, the Administrator, and upon any additional evidence, if any, presented to the agency at the hearing, shall condition such license or permit in such manner as may be necessary to insure compliance with applicable water quality requirements. If the imposition of conditions cannot insure such compliance such agency shall not issue such license or permit.

(3) The certification obtained pursuant to paragraph (1) of this subsection with respect to the construction of any facility shall fulfill the requirements of this subsection with respect to certification in connection with any other Federal license or permit required for the operation of such facility unless, after notice to the certifying State, agency, or Administrator, as the case may be, which shall be given by the Federal agency to whom application is made for such operating license or permit, the State, or if appropriate, the interstate agency or the Administrator, notifies such agency within sixty days after receipt of such notice that there is no longer reasonable assurance that there will be compliance with the applicable provisions of sections 1311, 1312, 1313, 1316, and 1317 of this title because of changes since the construction license or permit certification was issued in (A) the construction or operation of the facility, (B) the characteristics of the waters into which such discharge is made, (C) the water quality criteria applicable to such waters or (D) applicable effluent limitations or other requirements. This paragraph shall be inapplicable in any case where the applicant for such operating license or permit has failed to provide the certifying State, or, if appropriate, the interstate agency or the Admin-

istrator, with notice of any proposed changes in the construction or operation of the facility with respect to which a construction license or permit has been granted, which changes may result in violation of section 1311, 1312, 1313, 1316, or 1317 of this title.

(4) Prior to the initial operation of any federally licensed or permitted facility or activity which may result in any discharge into the navigable waters and with respect to which a certification has been obtained pursuant to paragraph (1) of this subsection, which facility or activity is not subject to a Federal operating license or permit, the licensee or permittee shall provide an opportunity for such certifying State, or, if appropriate, the interstate agency or the Administrator to review the manner in which the facility or activity shall be operated or conducted for the purposes of assuring that applicable effluent limitations or other limitations or other applicable water quality requirements will not be violated. Upon notification by the certifying State, or if appropriate, the interstate agency or the Administrator that the operation of any such federally licensed or permitted facility or activity will violate applicable effluent limitations or other limitations or other water quality requirements such Federal agency may, after public hearing, suspend such license or permit. If such license or permit is suspended, it shall remain suspended until notification is received from the certifying State, agency, or Administrator, as the case may be, that there is reasonable assurance that such facility or activity will not violate the applicable provisions of section 1311, 1312, 1313, 1316, or 1317 of this title.

(5) Any Federal license or permit with respect to which a certification has been obtained under paragraph (1) of this subsection may be suspended or revoked by the Federal agency issuing such license or permit upon the entering of a judgment under this chapter that such facility or activity has been operated in violation of the applicable provisions of section 1311, 1312, 1313, 1316, or 1317 of this title.

(6) Except with respect to a permit issued under section 1342 of this title, in any case where actual construction of a facility has been lawfully commenced prior to April 3, 1970, no certification shall be required under this subsection for a license or permit issued after April 3, 1970, to operate such facility, except that any such license or permit issued without certification shall terminate April 3, 1973, unless prior to such termination date the person having such license or permit submits to the Federal agency which issued such license or permit a certification and otherwise meets the requirements of this section.

(b) Compliance with other provisions of law setting applicable water quality requirements

Nothing in this section shall be construed to limit the authority of any department or agency pursuant to any other provisions of law to require compliance with any applicable water quality requirements. The Administrator shall, upon the request of any Federal department or agency, or State or interstate agency, or applicant, provide, for the purpose of this section, any relevant information on applicable effluent limitations, or other limitations, standards, regulations, or requirements, or water quality criteria, and shall,

when requested by any such department or agency or State or interstate agency, or applicant, comment on any methods to comply with such limitations, standards, regulations, requirements, or criteria.

(c) Authority of Secretary of the Army to permit use of spoil disposal areas by Federal licensees or permittees

In order to implement the provisions of this section, the Secretary of the Army, acting through the Chief of Engineers, is authorized, if he deems it to be in the public interest, to permit the use of spoil disposal areas under his jurisdiction by Federal licensees or permittees, and to make an appropriate charge for such use. Moneys received from such licensees or permittees shall be deposited in the Treasury as miscellaneous receipts.

(d) Limitations and monitoring requirements of certification

Any certification provided under this section shall set forth any effluent limitations and other limitations, and monitoring requirements necessary to assure that any applicant for a Federal license or permit will comply with any applicable effluent limitations and other limitations, under section 1311 or 1312 of this title, standard or performance under section 1316 of this title, or prohibition, effluent standard, or pretreatment standard under section 1317 of this title, and with any other appropriate requirement of State law set forth in such certification, and shall become a condition on any Federal license or permit subject to the provisions of this section.

(2)

Supreme Court, U.S.
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No. 93-1285

IN THE
Supreme Court of the United States
OCTOBER TERM, 1993

NEW YORK STATE DEPARTMENT OF ENVIRONMENTAL CONSERVATION, COMMISSIONER THOMAS C. JORLING, AND DEPUTY COMMISSIONER AND GENERAL COUNSEL MARC S. GERSTMAN,
Petitioners,

v.

NIAGARA MOHAWK POWER CORPORATION,
Respondent.

On Petition for Writ of Certiorari to the Court of Appeals of the State of New York

---

BRIEF IN OPPOSITION OF RESPONDENT NIAGARA MOHAWK POWER CORPORATION

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QUESTION PRESENTED

Whether the New York State Court of Appeals correctly decided that section 401 of the Clean Water Act (33 U.S.C. § 1341) does not empower the New York State Department of Environmental Conservation to condition the issuance of a license under Part I of the Federal Power Act or the performance of dam maintenance and repair work mandated by the Federal Energy Regulatory Commission on compliance with various state laws that are not water quality standards promulgated by the state and approved by the United States Environmental Protection Agency pursuant to section 303 of the Clean Water Act (33 U.S.C. § 1313).

STATEMENT AS TO AFFILIATED COMPANIES

Pursuant to Sup. Ct. R. 29.1, Respondent Niagara Mohawk Power Corporation states that it does not have any parent companies or subsidiaries, except wholly owned subsidiaries. Niagara Mohawk Power Corporation's wholly owned subsidiaries are:

NM Uranium, Inc.
HYDRA-CO Enterprises, Inc.
Opinac Energy Corporation
NM Suburban Gas Inc.

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NEW YORK STATE DEPARTMENT OF ENVIRONMENTAL CONSERVATION, COMMISSIONER THOMAS C. JORLING, AND DEPUTY COMMISSIONER AND GENERAL COUNSEL MARC S. GERSTMAN,

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---

BRIEF IN OPPOSITION OF RESPONDENT NIAGARA MOHAWK POWER CORPORATION

STATEMENT

A. Introduction

Niagara Mohawk Power Corporation ("Niagara Mohawk") is a public utility that provides electric service to more than 1.5 million customers living or working within a 24,000 square mile area in the State of New York. Niagara Mohawk derives approximately 10 percent of its requirements of electric capacity and energy from 73 hydroelectric facilities. These hydroelectric facilities provide over 700 megawatts of capacity and constitute the lowest cost component of Niagara Mohawk's energy resource mix.

Niagara Mohawk is the owner and operator of more hydroelectric facilities subject to the licensing provisions of the Federal Power Act ("FPA"), 16 U.S.C. §§ 792-828c (1988), than any other licensee. Niagara Mohawk recently has filed applications for new licenses with the Federal Energy Regulatory Commission ("FERC") to replace nine licenses for 30 of Niagara Mohawk's hydroelectric developments that were issued by the FERC or its predecessor, the Federal Power Commission, and that expired on December 31, 1993. Niagara Mohawk has also sought initial licenses for other hydroelectric projects. In connection with these applications, Niagara Mohawk also applied to the New York State Department of Environmental Conservation ("NYSDEC") for certifications under section 401 of the Clean Water Act ("CWA"), 33 U.S.C. § 1341 (1988). In addition, Niagara Mohawk is regularly required by the FERC to undertake dam repair or reconstruction projects, some of which also require section 401 certifications.

This case involves the review by the New York courts of a declaratory ruling by NYSDEC concerning the scope of NYSDEC's authority to regulate Niagara Mohawk's projects under section 401. In that ruling (App. at 1a-8a), NYSDEC claimed that it may condition a section 401 certification (and potentially veto a federal license) on any requirement remotely related to water quality. Applying a long line of its own precedent, the New York Court of Appeals rejected NYSDEC's claim of virtually unlimited authority, finding that NYSDEC may only enforce section 401 within the confines of "water quality standards" promulgated by the state and approved by the United States Environmental Protection Agency ("EPA") pursuant to section 303 of the CWA, 33 U.S.C. § 1313 (1988). (Pet. App. at 3a-13a.)

NYSDEC now seeks to press its claim before this Court. It has failed, however, to provide any basis for this Court to grant a writ of certiorari in this case. Con-

trary to NYSDEC's arguments, there is no conflict requiring resolution between the decisions of the New York Court of Appeals and the controlling holding of the Washington Supreme Court in *State Dep't of Ecology v. PUD No. 1 of Jefferson County*, 849 P.2d 646 (Wash. 1993), *cert. granted*, 62 U.S.L.W. 3206 (U.S. Oct. 4, 1993) (No. 92-1911) (hereinafter "the *Tacoma* case"). Moreover, further review is not required because the New York Court of Appeals was correct on the merits, applying a well-reasoned reading of the relevant statutes and its own long-standing precedents.

B. Statutory Scheme

1. Regulation under the Clean Water Act

In the CWA, 33 U.S.C. §§ 1251-1387 (1988), Congress enacted a comprehensive program for the control and abatement of water pollution that "anticipates a partnership between the States and the Federal Government." *Arkansas v. Oklahoma*, 112 S. Ct. 1046, 1054 (1992). This program entails two features relevant to this case. First, to supplement the effluent restrictions established by EPA,[1] section 303 authorizes states to establish "water quality standards," consisting of "the designated uses of the navigable waters involved and the water quality criteria for such waters based upon such uses." 33 U.S.C. § 1313(c)(2). State water quality standards must be approved by EPA before they can take effect.[2]

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[1] The EPA must promulgate effluent restrictions for different categories of water pollution sources, including: effluent limitations restricting the discharge of pollutants under sections 301 and 302 of the CWA, 33 U.S.C. §§ 1311, 1312; standards of performance applicable to the discharge of pollutants from new sources of water pollution under section 306, 33 U.S.C. § 1316; and toxic and pretreatment effluent standards under section 307, 33 U.S.C. § 1317.

[2] 33 U.S.C. § 1313(c)(3). Under EPA's regulations to review proposed state water quality standards, the "water quality criteria" in the state's water quality standards must be "sufficient to protect

Second, under section 401, applicants for federal licenses or permits for activities that may result in discharges of pollutants into navigable waters, must provide "a certification from the State in which the discharge originates or will originate . . . that any such discharge will comply with the applicable provisions of [Sections 301, 302, 303, 306 and 307 of the CWA]." 33 U.S.C. § 1341(a)(1). If the state denies certification, the federal agency may not issue the license or permit. *Id.* Section 401(d) requires states to condition certifications on any "effluent limitations and other limitations, and monitoring requirements" necessary for compliance with any applicable effluent restrictions promulgated by EPA and with "any other appropriate requirement of State law." 33 U.S.C. § 1341(d). Such limitations and requirements become conditions on the federal license or permit. *Id.*

2. *Regulation under the Federal Power Act*

Virtually all of Niagara Mohawk's hydroelectric projects are subject to regulation under Part I of the FPA, which vests in the FERC comprehensive authority over the construction, operation, and maintenance of hydroelectric facilities located on the navigable waters of the United States. *See* 16 U.S.C. §§ 797(e), 817(1). In discharging this broad authority, the FERC is directed to condition any hydroelectric license to ensure that the project is "best adapted to a comprehensive plan . . . for the adequate protection, mitigation, and enhancement of fish and wildlife (including related spawning grounds and habitat), and for other beneficial public uses." 16 U.S.C. § 803(a)(1). The FERC must give such nondevelopmental interests "equal consideration" in licensing deci-

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the designated uses." 40 C.F.R. § 131.6(c) (1993). "When [water quality] criteria are met, water quality will generally protect the designated use." 40 C.F.R. § 131.3(b) (1993). If a state does not enact water quality standards that meet EPA's requirements, EPA shall promulgate water quality standards for the state. 33 U.S.C. § 1313(c).

sions. 16 U.S.C. § 797(e). Section 10(j) of the FPA requires the FERC to solicit the recommendations of various state and federal agencies regarding the conditions to be included in a project's license. 16 U.S.C. § 803(j). The FERC, however, retains ultimate authority to determine if, and under what conditions, a license will be issued. *See California v. FERC*, 495 U.S. 490, 499 (1990).

C. Procedural History

On May 24, 1990, Niagara Mohawk petitioned NYSDEC for a declaratory ruling stating that NYSDEC was preempted by the FPA from applying the permit-based requirements of Title 5 of Article 15 of New York's Environmental Conservation Law ("ECL"), N.Y. Envtl. Conserv. Law §§ 15-0501 to -0515 (McKinney 1984 & Supp. 1994)—regarding dam safety, dam construction, and work in and around streams—to Niagara Mohawk's FERC-ordered dam reconstruction and dam safety-related work.[3] In a declaratory ruling,[4] NYSDEC claimed that, pursuant to section 401 of the CWA, it possesses the authority to apply to Niagara Mohawk's hydroelectric projects not only the permit-based requirements of Title 5 of Article 15 of the ECL, but also other provisions of the ECL that are only tangentially related to water quality.[5] NYSDEC did not claim that these pro-

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[3] This petition was filed pursuant to section 204(1) of the State Administrative Procedure Act, N.Y. A.P.A. § 204(1) (McKinney Supp. 1994), and N.Y. Comp. Codes R. & Reg. tit. 6, Part 619 (1989).

[4] Declaratory Ruling 15-09, *stated in* Letter from Marc S. Gerstman, Deputy Commissioner and General Counsel of NYSDEC, to Brian K. Billinson, Senior Counsel of Niagara Mohawk Power Corporation (Aug. 27, 1990). (App. at 1a-8a.)

[5] Specifically, NYSDEC listed (App. at 7a) the following other provisions of the ECL: Article 8 (the State Environmental Quality Review Act or "SEQRA"), N.Y. Envtl. Conserv. Law §§ 8-0101 to

visions were subsumed within the state's water quality standards; rather, NYSDEC claimed that *any* state law requirement would be a permissible basis for a condiiton to a section 401 certification as long as the requirement is "water-quality related." (App. at 8a.)

NYSDEC did not articulate any bounds to this alleged authority in its declaratory ruling. Indeed, by claiming authority to impose conditions based on SEQRA, NYSDEC expressly claimed unlimited authority to impose requirements related to environmental quality generally, even if they do not touch upon the water quality impact of a project.[6] NYSDEC's assertion of authority, if upheld, would have subjected Niagara Mohawk to a state environmental regulatory scheme that would duplicate and conflict with the licensing requirements of the FPA and would significantly delay and increase the cost of Niagara Mohawk's hypdroelectric licensing and dam maintenance/repair efforts.

Niagara Mohawk filed a petition for review of NYSDEC's ruling in the New York Supreme Court, Albany County, and on April 1, 1991, the court issued an

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-0117; Article 24 (Freshwater Wetlands Act), N.Y. Envtl. Conserv. Law at §§ 24-0101 to -1305; Article 11 (Fish and Wildlife Act), N.Y. Envtl. Conserv. Law at §§ 11-0101 to -2305; Article 15, Title 8 (Reservoir Releases), N.Y. Envtl. Conserv. Law at §§ 15-0801 to -0807; and Article 15, Title 27 (Wild, Scenic and Recreational Rivers Systems), N.Y. Envtl. Conserv. Law at §§ 15-2701 to -2723.

[6] *See* App. at 8a:

> Further, SEQRA has been interpreted as giving DEC the authority to impose conditions on State permits that are not substantively related to the permit being issued but which are "designed to mitigate the adverse environmental impacts identified, so long as these measures are reasonable in scope and reasonably related to the adverse impacts identified in the [environmental impact statement]." Thus, in conducting a SEQRA review of a 401 Certification request for a hydropower project, DEC may seek to impose additional conditions, *including* water-quality related conditions, on the certificate.

(Emphasis added; citation omitted.)

order and memorandum decision annulling NYSDEC's ruling. (Pet. App. at 25a-33a.) The court held that section 401 of the CWA authorized NYSDEC to apply to hydroelectric projects licensed by the FERC under the FPA only the water quality standards promulgated by NYSDEC under section 303 of the CWA,[7] not the other provisions of the ECL cited by NYSDEC in its declaratory ruling.[8] On January 7, 1993, the Appellate Division, Third Department, issued an Opinion and Order unanimously affirming the judgment of the New York Supreme Court. (Pet. App. at 14a-18a.)

On November 11, 1993, the New York Court of Appeals affirmed the Appellate Division's ruling and rejected NYSDEC's overly broad view of its authority as contrary to section 401. (Pet. App. at 1a-13a.) The Court of Appeals specifically held that, for purposes of issuing a section 401 certificate, NYSDEC was limited to considering the water quality standards set forth by the state and approved by the EPA under section 303. (*Id.* at 5a-6a.) The court held that NYSDEC's declaratory ruling was based on a fundamental misreading of section 401 that ignored explicit limitations on the scope of the certifying agency's authority. (*Id.* at 11a-12a.) The court also held that NYSDEC's position was contrary to its own long-standing interpretation of the authority to be exercised by New York state agencies under section

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[7] At the time Niagara Mohawk initiated the declaratory proceeding, NYSDEC's water quality standards were found at N.Y. Comp. Codes R. & Regs. tit. 6, §§ 701.19 and 704.2 (1985); they have been recodified in substantially the same form within N.Y. Comp. Codes R. & Regs. tit. 6, Parts 701-704 (1991-1993).

[8] The court also rejected NYSDEC's claim that the subject matter raised by Niagara Mohawk's petition was inappropriate for a declaratory order under the State Administrative Procedure Act. (Pet. App. at 28a-29a.) NYSDEC failed to seek review of this ruling in subsequent appeals in the New York courts.

401, and declined to follow decisions of other states, including the *Tacoma* case, cited by NYSDEC.[9]

REASONS FOR DENYING THE WRIT

I. THERE IS NO CONFLICT BETWEEN THE DECISIONS OF THE NEW YORK COURT OF APPEALS AND THE WASHINGTON SUPREME COURT.

NYSDEC's sole argument in support of its petition is that the decision below allegedly leads to a conflict between the decisions of the courts of last resort of the States of Washington and New York.[10] Based upon the facts and posture of the Washington Supreme Court's decision in the *Tacoma* case, 849 P.2d 646 (Wash. 1993), however, no meaningful conflict exists. The Court's exercise of its certiorari jurisdiction therefore is not warranted in this case.

The issue decided by the New York Court of Appeals was whether NYSDEC had authority to impose conditions on a section 401 certification based on state requirements that are, by NYSDEC's own admission, outside the scope of the state's water quality standards promulgated pursuant to section 303 of the CWA. In

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[9] The Court of Appeals relied upon precedent that has been applied in the New York courts for over 20 years. (*See* Pet. App. at 9a-10a (citing *de Rham v. Diamond*, 295 N.E.2d 673 (N.Y. 1973) and *Power Authority of State v. Williams*, 457 N.E.2d 726 (N.Y. 1983)).)

[10] NYSDEC thus evokes Sup. Ct. R. 10.1(b), which states that this Court may in its discretion grant a writ of certiorari "[w]hen a state court of last resort has decided a federal question in a way that conflicts with the decision of another state court of last resort or of a United States court of appeals." NYSDEC also asserts, without the support of argument or authority, that the New York Court of Appeals has wrongly decided "an important issue." (Pet. at 19.) However, offering no compelling explanation of why the question is "important" or why it was decided "wrongly" (other than reasserting arguments from below), NYSDEC gives no reason for this Court to exercise its discretion under Sup. Ct. R. 10.1(c).

contrast, the Washington Supreme Court in the *Tacoma* case dealt with an issue that is not presented here: whether conditions imposed by a state environmental agency on a section 401 certification were properly within the state's water quality standards pursuant to section 303. Specifically, in what NYSDEC describes as the Washington court's "primary holding" (Pet. at 6 n.3), the court in *Tacoma* upheld streamflow conditions imposed by a state agency on its certification of a hydropower project, even though the project owner claimed that such conditions would interfere with the FERC's streamflow setting functions under the FPA, because the state agency claimed that "the streamflow conditions in the 401 certificate issued to Tacoma *were necessary to assure compliance with Washington's water quality standards.*" *Tacoma*, 849 P.2d at 650 (emphasis added).

The primary issue addressed by the Washington court —i.e., whether a particular condition in a section 401 certification was necessary to comply with a section 303 water quality standard—was not presented by NYSDEC's declaratory ruling and, accordingly, was not addressed by the New York Court of Appeals. Unlike the state agency in the *Tacoma* case, NYSDEC conceded in the proceedings below and before this Court that the panoply of substantive state requirements that it seeks to impose in the section 401 certification process is *not* part of New York's section 303 water quality standards. (*See* App. at 4a & 7a-8a; Pet. at 16-17; Pet. App. at 12a.) The New York and Washington decisions thus address *different* statutory provisions and legal issues. While the Washington court addressed the proper scope of a state's water quality standards under section 303 of the CWA, the New York Court of Appeals addressed the proper scope of a state's authority under section 401 of the CWA.

In the *Tacoma* case, the Washington court made ancillary statements concerning the state agency's authority to condition section 401 certifications on "all state water

quality-related statutes and rules, including, but not limited to, the water quality standards the state has adopted as required by section 303 of the Clean Water Act." *Tacoma*, 849 P.2d at 651. However, after the Washington court decided that the streamflow conditions imposed by the state agency were necessary to satisfy the state's water quality standards, the court's further statements about the state agency's broader authority were unnecessary to the court's decision to uphold the agency's actions. NYSDEC admits that the Washington court's statements about the state agency's authority to look beyond the state's water quality standards constitute, at most, an alterantive holding of the *Tacoma* case. (*See* Pet. at 6 n.3.) In fact, the ancillary statements of the Washington court are *dicta*, and the New York Court of Appeals properly refrained from giving them any weight.[11]

Accordingly, NYSDEC may not rely on the Washington court's ancillary statements to demonstrate that there is a conflict between the decisions of the New York and Washington courts.[12] The policies favoring uniformity in

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[11] It is not even clear that the Washington courts would follow these statements. *See Pedersen v. Klinkert*, 352 P.2d 1025, 1028 (Wash. 1960) ("Our statement . . . was not necessary to the decision in that case and was *dicta*."); *State v. Potter*, 842 P.2d 481, 489 n.7 (Wash. Ct. App. 1992) (finding that a certain statement was *dictum* because it "appears in the second of three alternative holdings to the case and is not one of the main holdings" and because "[s]tatements in a case that do not relate to an issue before the court and are unnecessary to decide the case constitute *obiter dictum*, and need not be followed."); *Plankel v. Plankel*, 841 P.2d 1309, 1310 (Wash. Ct. App. 1992) ("Initially, we observe that the second rationale of [the case] was not necessary to the decision and is thus non-binding *dicta*."). *See also Kastigar v. U.S.*, 406 U.S. 441, 454-55 (1972) ("The broad language in [the case] relied upon by petitioners was unnecessary to the Court's decision, and cannot be considered binding authority.").

[12] As noted by NYSDEC (Pet. at 5), the *Tacoma* case is currently pending review in this Court in Case No. 92-1911. Niagara Mohawk participated in that proceeding as an *amicus curiae* out of concern that the Washington court's ill-advised *dicta* concerning a state

the interpretation of federal laws embodied in Sup. Ct. R. 10.1(b) are not present in this case, and NYSDEC has provided no basis for this Court to undertake the extensive task of reviewing the decision below.[13]

II. THE DECISION BELOW WAS WELL FOUNDED ON A LONG-STANDING INTERPRETATION BY NEW YORK'S HIGHEST COURT OF THE AUTHORITY THAT NEW YORK STATE AGENCIES MAY EXERCISE WITH RESPECT TO FEDERALLY LICENSED PROJECTS.

The Court of Appeals' reliance on time-honored New York precedent provides an additional reason for this Court to refrain from exercising its discretion to review the decision below. This is not a case in which the court below rested on a novel interpretation of section 401.

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agency's authority to look beyond water quality standards might be inappropriately extended. NYSDEC's petition demonstrates that Niagara Mohawk's concerns were well-founded. This case is not rendered worthy of review simply because Niagara Mohawk in its *amicus* brief refuted the Washington Court's *dicta* regarding the sole issue in this case.

[13] In its petition, NYSDEC does not identify any state court decisions other than the *Tacoma* case that allegedly conflict with the New York Court of Appeals' decision. NYSDEC cited to various other state decisions in the courts below to support its broad view of its authority (including, *inter alia*, *Arnold Irrigation Dist. v. Department of Envtl. Quality*, 717 P.2d 1274 (Or. Ct. App. 1986); *Bangor Hydro-Elec. Co. v. Board of Envtl. Protection*, 595 A.2d 438 (Me. 1991); *Georgia-Pacific Corp. v. Department of Envtl. Conservation*, 528 A.2d 944 (Vt. 1992), *cert. dismissed*, 114 S. Ct. 671 (1994); *Hi-Line Sportsmen Club v. Milk River Irrigation Dists.*, 786 P.2d 13 (Mont. 1990); *Marmac Corp. v. Department of Natural Resources of West Virginia*, No. 81-1792, slip op. (W. Va. Cir. Ct. June 9, 1982); *Pennsylvania Dep't of Envtl. Resources v. City of Harrisburg*, 578 A.2d 563 (Pa. Commw. Ct. 1990)). Because these cases involve decisions of lower state courts, rest on the same primary issue involved in the *Tacoma* case, or are consistent with the New York Court of Appeals' decision, these other state cases cannot be read to create a conflict with the decision below that must be resolved by this Court.

Rather, the court applied an interpretation that has defined the authority of administrative agencies in New York for over two decades. In 1973, the Court of Appeals, construing the predecessor of section 401, stated that:

> Congress did not empower the States to reconsider matters, unrelated to their water quality standards, which the [Federal] Power Commission has within its exclusive jurisdiction under the Federal Power Act.

de Rham v. Diamond, 295 N.E.2d at 768. This holding was echoed and reaffirmed, with respect to section 401, ten years later:

> In acting on an application for State section 401 certification of a hydroelectric project as a prerequisite to the issuance of a Federal license therefor, the Commissioner of Environmental Conservation is limited to determining whether applicable water quality standards will be met . . . .

Power Authority of State v. Williams, 457 N.E.2d at 727. As recognized by the Court of Appeals, accepting NYSDEC's position would constitute a "highly significant turnabout in law and policy" in New York. (Pet. App. at 10a.)

NYSDEC thus does not seek review of a single decision that implements a new restriction on its regulatory authority, but asks this Court "fundamentally to restructure a highly complex and long enduring regulatory regime, implicating considerable reliance interests of licensees and other participants in the regulatory process." *California*, 495 U.S. at 500. The federal courts have noted that states have primary responsibility for enforcing and interpreting section 401.[14] Regulated companies in New York,

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[14] *Puerto Rico Sun Oil Co. v. U.S. EPA*, 8 F.3d 73, 81 (1st Cir. 1993) ("Although state certification provisions are incorporated into federal permits, review of a state certification is a matter for local courts."); *Roosevelt Campobello Int'l. Park Comm. v. U.S. EPA*, 684 F.2d 1041, 1056 (1st Cir. 1982) (noting that EPA has, since 1977, interpreted section 401 "broadly to preclude federal

such as Niagara Mohawk, have come to rely over the years on the state's interpretation of NYSDEC's limited authority and have structured their business accordingly, Moreover, NYSDEC has not shown that the Court of Appeals' consistent application of section 401 over the past 20 years has inhibited its efforts to protect water quality in New York.[15] The Court should decline to review and to disrupt the Court of Appeals' well-settled interpretation of the appropriate bounds of NYSDEC's authority under section 401.

III. THE NEW YORK COURT OF APPEALS CONSTRUED SECTION 401 PROPERLY.

A. The Language and Structure of Section 401 Support the Court of Appeals' Decision.

An additional reason why review is unwarranted in this case is that the New York Court of Appeals correctly interpreted section 401. The plain language of section 401 spells out the limits recognized by the Court of Appeals to NYSDEC's authority to impose conditions on section 401 certifications. Although NYSDEC is correct in noting (Pet. at 7) that section 401(d) authorizes states to impose conditions on certifications based on "any other appropriate requirements of State law," the states' conditioning authority attaches only to certifications "provided under this section."[16] Identifying which requirements are

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agency review of state certification" and that "the proper forum to review the appropriateness of a state's certification is the state court, and that federal courts and agencies are without authority to review the validity of requirements imposed under state law or in a state's certification.").

[15] To the contrary, NYSDEC has made full use of opportunities to protect water quality, including, for example, participation in FERC's prefiling consultation process and license application proceedings. *See e.g., Niagara Mohawk Power Corp.*, 63 F.E.R.C. (CCH) ¶ 62,257 at 64,470 (1993).

[16] Section 401(d) provides:

> Any certification provided under this section shall set forth any effluent limitations and other limitations, and monitoring

"appropriate" as conditions imposed on section 401 certifications, therefore, depends on when such certifications are required.

Under section 401(a)(1), a state may deny certification only if a discharge from a federally licensed project will not comply with the applicable provisions of one of five listed sections of the CWA.[17] Four of the enumerated sections authorize the Administrator of EPA to promulgate restrictions on discharges of pollutants by point sources. *See supra* note 1. The remaining provision, section 303, authorizes the states to promulgate water quality standards which must be approved by EPA before they may take effect. *See supra* note 2 and accompanying text. In section 401(a)(1), Congress gave states the power to enforce only federally promulgated effluent restrictions or federally approved water quality standards.

In section 401(a)(1), Congress did not authorize states to veto federal licenses or permits based on state requirements that were not presented to EPA for approval. NYSDEC's reading of the "appropriate requirement" clause of section 401(d) to include all state laws remotely touching on water quality would eviscerate the circumscribed limits of state authority under section 401(a)(1).

> requirements necessary to assure that any applicant for a Federal license or permit will comply with any applicable effluent limitations or other limitations, under section 1311 or 1312 of this title, standard of performance under section 1316 of this title, or prohibition, effluent standard, or pretreatment standard under section 1317 of this title, and with any other appropriate requirement of State law set forth in such certification. . . .

33 U.S.C. § 1341(d).

[17] Section 401(a)(1) requires an applicant for a Federal license or permit authorizing an activity that may result in a discharge into navigable waters, to provide a State certification "that any such discharge will comply with the applicable provisions of sections [301, 302, 303, 306 and 307 of the CWA]." 33 U.S.C. § 1341(a)(1).

Such a reading would enable state agencies to impose onerous conditions on certifications that would be tantamount to vetoing federal licenses or permits based on grounds that fall outside federally mandated effluent limitations and federally approved state water quality standards.

B. NYSDEC's Interpretation of Section 401 and Its Attacks on the Court of Appeals' Decision Are Unfounded.

NYSDEC argues, based on legislative history, that the inclusion of a reference to section 303 (the water quality standards provision) in subsection 401(a)(1) without a similar reference in subsection 401(d) must mean that the conditioning authority in the latter subsection is broader than the certification authority under the former. (Pet. at 8-9.) NYSDEC errs, however, in reading some purpose into the lack of an explicit reference to section 303 in subsection 401(d). When Congress amended subsection 401(a)(1) to include a reference to section 303 in 1977, the conference committee made clear that the omission of similar references in other sections, such as subsection 401(d), was not to have a substantive effect:

> It is understood that section 303 is required by the provisions of section 301. Thus, the inclusion of section 303 in section 401 while at the same time not including section 303 in the other sections of the Act where sections 301, 302, 306 and 307 are listed is in no way intended to imply that 303 is not included by reference to 301 in those other places in the Act. . . . *Section 303 is always included by reference where section 301 is listed.*

H.R. Conf. Rep. No. 830, 95th Cong., 1st Sess. 96 (1977), *reprinted in* 1977 U.S.C.C.A.N. 4424, 4471 (emphasis added). Subsection 401(d) therefore does include an implicit reference to section 303 by including an explicit reference to section 301.

NYSDEC also contends that the Court of Appeals decided matters that were unripe for decision. (Pet. at 18.) As noted *supra* at note 8, however, NYSDEC failed to seek review of the ripeness issue after the trial court initially found that the issues raised by Niagara Mohawk's request for a declaratory ruling were appropriately within the scope of New York's declaratory action procedures. The ripeness issue was not properly preserved for later review.[18] Because the issues of ripeness and its preservation for appellate review are intimately tied to state procedural law, these issues cannot form appropriate subjects of or bases for this Court's certiorari jurisdiction.[19]

Finally, NYSDEC attempts to rely on a letter from EPA to FERC and the deference to which EPA's views are entitled.[20] (Pet. at 17-18.) This letter—for whatever an agency's informal views are worth—does not address the issue raised in NYSDEC's declaratory ruling or the New York Court of Appeals' decision. The letter discusses only the permissible scope of a state's water quality standards; it does not address whether a state may look *beyond* its water quality standards in the section 401 process. Regardless of its bearing on the former point, the EPA letter provides no support for NYSDEC's petition.

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[18] *See Gramercy Equities Corp. v. Dumont*, 531 N.E.2d 629, 632 (N.Y. 1988); *People by Abrams v. Two Wheel Corp.*, 525 N.E.2d 692, 694 (N.Y. 1988). *See also Street v. New York*, 394 U.S. 576, 581-82 (1969) (finding that there was no jurisdiction to resolve an issue that was not presented to the New York Court of Appeals).

[19] *See Duncan v. Tennessee*, 405 U.S. 127, 127 (1972) (dismissing writ of certiorari because the issues were "so interrelated with [peculiar state criminal procedure rules] as not to warrant the exercise of the certiorari jurisdiction of this Court.").

[20] Letter from LaJuana S. Wilcher, Assistant Administrator of the EPA to Lois D. Cashell, Secretary of the FERC (Jan. 18, 1991).

C. The Court of Appeals Gave Due Consideration to Congress's Comprehensive Regulatory Scheme for Hydroelectric Projects.

By holding that NYSDEC has limited authority under section 401, the New York Court of Appeals properly recognized the comprehensive regulatory structure created by Congress and vested in the FERC. The FERC's broad authority over virtually every aspect of hydropower development, including environmental aspects, is apparent on the face of the FPA. Indeed, in 1986 (after the enactment and most recent amendment of section 401 of the CWA), Congress enacted the Electric Consumers Protection Act ("ECPA"), Pub. L. No. 99-495, 100 Stat. 1243 (1986), primarily to reaffirm the duty of the FERC to balance all aspects of hydroelectric projects in its licensing decisions.[21]

This Court has recognized that the FPA was intended to consolidate the regulation of hydropower projects under the control of a single federal agency to promote the de-

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[21] Section 4(e) of the FPA, as amended by the ECPA, requires the FERC to

> give equal consideration to the purposes of energy conservation, the protection, mitigation of damage to, and enhancement of, fish and wildlife (including related spawning grounds and habitat), the protection of recreational opportunities, and the preservation of other aspects of environmental quality.

16 U.S.C. § 797(e). Section 10(a)(1) requires FERC to condition a license so that the project

> will be best adapted to a comprehensive plan for improving or developing a waterway or waterways for the use or benefit of interstate or foreign commerce, for the improvement and utilization of water-power development, for the adequate protection, mitigation, and enhancement of fish and wildlife (including related spawning grounds and habitat), and for other beneficial public uses.

16 U.S.C. § 803(a)(1). Also, the ECPA added section 10(j) to the FPA to require the FERC to solicit the recommendations of all interested state and federal resource agencies regarding conditions to be included in a license. 16 U.S.C. § 803(j).

velopment of the hydroelectric potential of the Nation's water resources in a balanced manner. *First Iowa Hydro-Elec. Coop. v. FPC*, 328 U.S. 152, 174 & 180 (1946) (noting that "Congress was concerned with overcoming the danger of divided authority so as to bring about the needed development of water power" and that the FPA "was the outgrowth of a widely supported effort of the conservationists to secure enactment of a complete scheme of national regulation which would promote the comprehensive development of the water resources of the Nation, insofar as it was within the reach of the federal power to do so"). This Court also recognized that an integral part of this consolidated authority is the balancing of developmental and environmental concerns. *See Udall v. FPC*, 387 U.S. 428 (1967).

The comprehensive regulatory structure established by the FPA leaves only a limited role for states in the regulation of hydropower development. By enacting the ECPA to amend the FPA, Congress emphasized that it intended to preserve the FERC's discretion to accept or reject the recommendations of state and federal resource agencies concerning conditions designed to satisfy environmental and other concerns.[22] This Court recognized that:

> By directing FERC to consider the recommendations of state wildlife and other regulatory agencies while providing FERC with *final authority* to establish license conditions (including those with terms inconsistent with the States' recommendations), Congress has amended the FPA *to elaborate and reaffirm First Iowa's understanding that the FPA establishes a broad and paramount federal regulatory role.*

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[22] "The provision is intended to stress the expertise of these agencies and the need for FERC to rely on them. Section 10(j) does not give such agencies a veto, nor does it give them mandatory authority . . . ." H.R. Conf. Rep. No. 99-934, 99th Cong., 2d Sess. 23 (1986), *reprinted in* 1986 U.S.C.C.A.N. 2540.

California, 495 U.S. at 499 (emphasis added). NYSDEC's suggestion that states have authority to duplicate or override the regulatory activities of the FERC is therefore unfounded.[23]

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[23] This Court has held that "[t]he detailed provisions of the [FPA] providing for the federal plan of regulation leave no room or need for conflicting state controls." *First Iowa*, 328 U.S. at 181. Nor is there room for states to override the FERC's decisions about the balance of relevant developmental and environmental factors. *Id.* at 164 ("Such a veto power easily could destroy the effectiveness of the federal act. It would subordinate to the control of the State the 'comprehensive' planning which the Act provides shall depend upon the judgment of the Federal Power Commission or other representatives of the Federal Government."); *see also Sayles Hydro Assoc. v. Maughan*, 985 F.2d 451, 456 (9th Cir. 1993) ("There would be no point in Congress requiring the federal agency to consider the state agency recommendations on environmental matters and make its own decisions about which to accept, if the state agencies had the power to impose the requirements themselves.").

CONCLUSION

This Court should deny the petition for writ of certiorari.

Respectfully submitted,

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March 10, 1994

APPENDIX

APPENDIX

NYSDEC DECLARATORY RULING

STATE OF NEW YORK
DEPARTMENT OF
ENVIRONMENTAL CONSERVATION
Albany, New York 12233

[EMBLEM]

MARC S. GERSTMAN
Deputy Commissioner and General Counsel

August 27, 1990

Mr. Brian K. Billinson
Niagara Mohawk Power Corporation
300 Erie Boulevard West
Syracuse, New York 13202

RE: Petition for Declaratory Ruling: 15-09

Dear Mr. Billinson:

You have petitioned, on behalf of Niagara Mohawk Power Corporation (Niagara Mohawk), for a Declaratory Ruling pursuant to § 204 of the State Administrative Procedure Act and 6 NYCRR Part 619 regarding the applicability of Environmental Conservation Law (ECL) Article 15, Title 5 to Niagara Mohawk's federally licensed hydropower dam repair and reconstruction activities undertaken pursuant to an order of the Federal Energy Regulatory Commission (FERC).

The question of federal preemption, which raises issues of concurrent federal-state jurisdiction and Congress' intent to occupy the field of hydropower regulation, is not properly resolved through the issuance of a Declaratory Ruling. SAPA § 204; 6 NYCRR §§ 619.3(a) and (d). Moreover, it is not necessary to address the issue of fed-

eral preemption under the Federal Power Act since I find, for the reasons set forth below, that the substantive provisions of ECL Article 15, Title 5 are applicable to federally licensed hydropower facilities under authority granted by Congress to the State under § 401 of the Federal Clean Water Act (§ 401). 33 U.S.C. § 1341.

Section 401 of the Federal Clean Water Act (CWA) is an express congressional provision giving the states permit authority over federally licensed hydropower facilities to assure compliance with applicable water quality standards. 33 U.S.C. § 1341(a)(1). The scope of § 401 is best understood through examination of its precursor, § 21 of the Federal Water Pollution Control Act ("FWPCA"), enacted in 1970.

The FWPCA focused primarily on the quality of the waters receiving pollution, not on the source of pollution. The CWA, enacted in 1972, significantly shifted emphasis in pollution control strategy from water quality standards to effluent limitations. 1972 *U.S. Code Cong. & Adm. News* 7668, 7673. The CWA also expanded the scope of the certification authority granted to the states from water quality standards to include "other limitations, standards, regulations, or requirements, or water quality criteria".

This evolution of authority can be seen by comparing the following two sections of the FWPCA and the CWA:

> FWPCA 21(c):
>
> Nothing in this section shall be construed to limit the authority of any department or agency pursuant to any other provision of law to require compliance with applicable water quality *standards*. The Secretary shall, upon the request of any . . . State . . . provide, for the purpose of this section, any relevant information on applicable water quality *standards*, and shall, when requested by any such . . . State . . .

comment on any methods to comply with such *standards* (emphasis added).

CWA 401(b):

Nothing in this section shall be construed to limit the authority of any department or agency pursuant to any other provision of law to require compliance with any applicable water quality *requirements.* The Administrator shall, upon the request of any . . . State . . . provide, for the purpose of this section, any relevant information on applicable *effluent limitations, or other limitations, standards, regulations, or requirements, or water quality criteria,* and shall, when requested by any such or . . . State . . . comment on any methods to comply with such *limitations, standards, regulations, requirements, or criteria* (emphasis added).

Further, the CWA added the following provision, clearly delineating the broadened scope of the states' authority:

CWA 401(d):

Any certification provided under this section shall set forth any effluent limitations *and other limitations,* and monitoring requirements necessary to assure that any applicant for a Federal license or permit will comply with any applicable effluent limitations *and other limitations,* under section 301 or 302 of this Act, standard of performance under section 306 of this Act, or prohibition, effluent standard, or pretreatment standard under section 307 of this Act, *and with any other appropriate requirement of State law set forth in such certification,* and shall become a condition on any Federal license or permit subject to the provisions of this section (emphasis added).

It is notable that the House version of § 401(d), HR 11896, did not contain the "any other appropriate re-

quirement" provision. Public Law 92-500; Legislative History, Report 93-1 at p. 1052.

In analyzing the newly proposed § 401 the 1972 Senate Committee Report states:

> In addition, the provision makes clear that any water quality requirements established under State law, more stringent than those requirements established under this Act, also shall through certification become conditions on any Federal license or permit. The purpose of the certification mechanism provided in this law is to assure that Federal licensing or permitting agencies cannot override State water quality requirements.

1972 *U.S. Code Cong. & Ad. News* 3668, 3735.

Given the clear changes enacted in the 1972 CWA, it is evident that Congress intended the states' authority to extend beyond compliance with water quality standards. The requirements of state law which can be imposed by states in a 401 Certificate were explicitly broadened.

The extent of New York's authority under CWA § 401 has not yet been raised before the New York Courts[.] The only cases relevant to the issue either construed the provisions of the FWPCA, not the CWA, or are distinguishable on the facts.

In *De Rham v. Diamond*, 32 N.Y.2d 34, 44 (1973) the New York Court of Appeals explicitly recognized and adopted the precedent established in *First Iowa Hydroelectric Cooperative v. Federal Power Commission*, 328 U.S. 152 (1946), finding that Congress had granted the Federal Power Commission [(FPC) now the Federal Energy Regulatory Commission (FERC)] broad powers to regulate hydroelectric facilities and that that jurisdiction preempted state licensing and permit functions. In *De Rham*, opponents to Consolidated Edison's proposal to build a pumped-storage facility on Storm King Mountain challenged the DEC's certification pursuant to FWPCA

§ 21(b) that the project would not violate applicable water quality standards. The court found that FWPCA § 21(b) relinquished only one element of jurisdiction to the State by authorizing the State to certify whether or not a project would contravene water quality standards. The court held that:

> Congress did not empower the States to reconsider matters, unrelated to their water quality standards, which the Power Commission has within its exclusive jurisdiction under the Federal Power Act.

32 N.Y.2d at 44.

After reaching this conclusion, the court went on to determine that DEC did not have jurisdiction to examine other issues that had already been examined by the FPC.

In *Power Authority of the State of New York ("PASNY") v. Williams*, 94 A.D.2d 69 (Third Dept. 1983); *rev'd.* 60 N.Y. 2d 315 (1983), DEC denied a 401 certificate for the Prattsville pumped-storage project on the grounds that it would not meet the applicable water quality standards. The Power Authority argued that DEC should have broadened its review to encompass the State Energy Master Plan (SEMP) in rendering its decision. The Appellate Division agreed, holding that DEC must act in accord with the energy policy which requires weighing environmental impacts with the overall public interest. The New York Court of Appeals reversed, finding that DEC had not erred in not considering the SEMP and general environmental factors. The Court, citing *De Rham*, found the FPA preempts all state licensing and permit functions and that the Clean Water Act relinquished to the States only the narrow question of whether or not construction and operation of the project would violate applicable water quality standards. 60 N.Y.2d at 324-25.

In *Fourth Branch Associates, et ano. v. DEC*, —— Misc. 2d ——, 550 N.Y.S.2d 769 (S.Ct. Albany Co.

1989), Petitioners challenged the issuance of a 401 certificate for a hydropower project, arguing that DEC failed to adequately review the project under the provisions of the State's Environmental Quality Review Act (SEQRA) Environmental Conservation Law Article 8; 6 NYCRR Part 617. Petitioners' claims were dismissed by the court, which held that the FPA pre-empts DEC from conducting a full SEQRA review of the project in conjunction with the issuance of a 401 certificate, 550 N.Y.S.2d at 777. The court, citing *PASNY* and *De Rham*, also found that DEC's authority under the 401 certificate was limited to a consideration of the project's impacts on applicable water quality standards. 550 N.Y.S.2d at 773-74. In a related decision, *Fourth Branch Associates v. DEC*, Slip Op. 6029-89; 1989 WL 165837 (S. Ct. Albany Co. November 28, 1989)], the court, citing *Fourth Branch Associates* and *First Iowa*, held that DEC could not require proponents of a federally licensed hydropower project to obtain State-issued ECL Article 15 Permits. Slip Op. at 6.

In *De Rham* the court correctly limited the State to considering compliance with water quality standards as it was interpreting § 21 of the FWPCA, and not § 401 of the CWA. In *PASNY*, the court upheld the State's determination that water quality standards of the receiving waters would be violated by the operation of a pumped storage facility. As the 401 certificate was denied on this most basic threshold determination, the issue of whether or not other water quality requirements could be imposed was never reached by the court.

While the lower court's decision in *Fourth Branch* could be interpreted to limit the State's § 401 review to determining whether or not water quality standards will be maintained, the opinion did not analyze the differences between § 21 and § 401, but merely stated that § 401 supersedes § 21 "without substantial change". 550 N.Y.S.2d at 769. The comparative analysis set forth above and the legislative history of these sections leads to the con-

clusion that the decision incorrectly interpreted the scope of the State's authority under CWA § 401. The court in *Fourth Branch* did not revoke the 401 certificate in question. That certificate contains expansive conditions which go beyond assuring compliance with water quality standards. Thus, the *Fourth Branch* decision did not require nor has it caused the Department to limit the scope of the 401 certificates it issues and does not represent *stare decisis* for purposes of determining that scope.

Pursuant to the authority granted by Congress to require compliance with all water quality-related State statutes and regulations and "any appropriate requirement of State law" and to the authority conferred by State law, DEC has issued regulations governing use and protection of State waters. 6 NYCRR Part 608. In addition to DEC's explicit water quality standards, 6 NYCRR Parts 701 through 704, Part 608 makes several other regulatory programs applicable to applications for 401 Certification. Those regulatory requirements, as made applicable through 6 NYCRR 608.7(6) are:

(a) Protection of Waters: disturbance of stream beds [ECL § 15-0501];

(b) Protection of Waters: dam construction [ECL § 15-0503];

(c) Protection of Waters: excavation or fill [ECL § 15-0505];

(d) Dam Safety [ECL § 15-0507];

(e) Reservoir Releases [ECL § 15-0801 *et seq.*];

(f) Wild, Scenic and Recreational River System [ECL 15-2700, *et seq*];

(g) Freshwater Wetlands [ECL Article 24];

(h) Fish and Wildlife [ECL Article 11]; and

(i) Environmental Quality Review [ECL Article 8].

An analysis of each of the applicable regulatory requirements shows that they fall within the scope of water-quality related conditions authorized by CWA § 401. These requirements are intended to protect fish and aquatic resources, and other natural resources, against erosion, excessive turbidity, and temperature and flow changes. Further, SEQRA has been interpreted as giving DEC the authority to impose conditions on State permits that are not substantively related to the permit being issued but which are "designed to mitigate the adverse environmental impacts identified, so long as these measures are reasonable in scope and reasonably related to the adverse impacts identified in the EIS". *Town of Henrietta v. DEC*, 76 A.D.2d 215, 226-227 (4th Dept. 1990). Thus, in conducting a SEQRA review of a 401 Certification request for a hydropower project, DEC may seek to impose additional conditions, including water-quality related conditions, on the certificate.

In summary, Congress has given the states the ability to resolve all water-quality related issues pertaining to the development of hydropower projects, pursuant to Section 401 of the Clean Water Act. This includes incorporation of substantive standards, based in State law and related to water quality, into the State-issued 401 Certificate. I have therefore determined that the substantive provisions of ECL Article 15 Title 5 are applicable to federally licensed hydropower facilities pursuant to § 401 of the Clean Water Act.

Commissioner Jorling recently issued an Organization and Delegation Memorandum #907-24 addressing the Department's hydropower review process. I am enclosing a copy to provide you with further guidance.

Very truly yours,

/s/
MARC S. GERSTMAN
Deputy Commissioner and
General Counsel

Enclosure

(3)

No. 93-1285

Court.
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IN THE

Supreme Court of the United States

October Term, 1993

NEW YORK STATE DEPARTMENT OF ENVIRONMENTAL CONSERVATION, COMMISSIONER THOMAS C. JORLING, and DEPUTY COMMISSIONER AND GENERAL COUNSEL MARC S. GERSTMAN,

Petitioners,

against

NIAGARA MOHAWK POWER CORPORATION,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

REPLY BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

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No. 93-1285

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OCTOBER TERM, 1993.

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PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

Reply Brief in Support of Petition for a Writ of Certiorari

The Court should grant the petition because of conflicts between state high courts involving an important issue.

The decision issued by the New York State Court of Appeals squarely conflicts with the decision issued by the

Washington Supreme Court in *P.U.D. No. 1 of Jefferson County and City of Tacoma v. State of Washington, Department of Ecology, Department of Fisheries, and Department of Wildlife*, 849 P. 2d 646 (Wash. 1993), *cert. granted*, 62 U.S.L.W. 3206 (Oct. 4, 1993), No. 92-1911, argued before this Court February 23, 1994. The Washington court held that a State could consider a State statute when evaluating an application for a water quality certification under Section 401 of the Clean Water Act, 33 U.S.C. § 1341, and the New York court held that a State could not consider a State statute when making that evaluation. This Court should grant the petition in order to resolve the conflict or, at a minimum, refrain from ruling on the petition in this case pending issuance of this Court's decision in the Washington case.

Contrary to the assertions in respondent's brief (Br. in Opp., pp. 8-11), the Washington court's holding that water quality certifications "may include conditions to enforce all water quality-related *statutes and rules*, including but not limited to, state water quality standards" (849 P. 2d at 651, emphasis added) is not mere *dicta* but is central to that court's decision. In the case decided by the Washington court, the issue was whether the conditions imposed in the State's water quality certification were within the scope of the State's authority under Section 401 of the Clean Water Act, 33 U.S.C. § 1341. The conditions were imposed in reliance on a State statute which mandated retention of base flows in the river in order to protect the water's uses and values for fish and wildlife, recreational purposes and its use for navigation. The Washington statute was not part of Washington's EPA-approved water quality standards. 849 P.2d at 653. In the case decided by the New York court, the issue was whether the State could consider water quality-

protective State statutes, not part of New York's EPA-approved water quality standards, when evaluating an application for a water quality certification. The legal questions involved in both cases are the same and the rulings directly conflict with each other.

The Washington court's additional holding that the Washington statute qualified as an "appropriate requirement of State law" under Section 401(d) of the Clean Water Act, 33 U.S.C. § 1341(d), also directly conflicts with the New York court's holding that that section does not authorize States to consider State statutes when evaluating an application for a water quality certification. The New York court expressly stated that the Washington court had adopted a broader view of 33 U.S.C. § 1341(d) (Pet., 10a-11a) and declined to agree. Simply put, two state high courts have issued conflicting rulings interpreting the scope of State authority conferred by the same federal statute, and resolution of the conflict by this Court is appropriate.

Respondent's assertion (Br. in Opp., p. 8, fn. 10) that the issue of the scope of State authority under Section 401 of the Clean Water Act, 33 U.S.C. § 1341, does not present an important question under Rule 10.1(c), is belied by the interest shown by industry, the regulators, and the environmental legal community in this issue at the Supreme Court. In the Washington case, which reached this Court earlier than did this case, industry submitted six *amicus* briefs in opposition to the State of Washington's position. One was from Niagara Mohawk Power Corporation, the respondent here, as acknowledged at footnote 12 (Br. in Opp., pp. 10-11). Briefs in support of Washington's position were submitted by 44 states, including New York, and *amicus* briefs in support of Washington were also submitted by 18

environmental groups and the United States. These cases are important because hundreds of relicensing proceedings will occur in the next decade as existing 50 year Federal Power Commission (now the Federal Energy Regulatory Commission) licenses for hydroelectric projects expire.

Conclusion

This Court should grant the petition or, at a minimum, withhold ruling on the petition pending issuance of this Court's decision in the Washington case.

Respectfully submitted,

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